Supreme Court, U.S.
FILED
OCT 27 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-5161

KURK KENDALL JOHNSON,

Petitioner,

versus

THE STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

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October, 1980

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of Oklahoma (hereinafter referred to as the State), by and through Jan Eric Cartwright, Attorney General of the State of Oklahoma, respectfully requests that this Honorable Court deny the petition for writ of certiorari seeking review of the opinion of the Oklahoma Court of Criminal Appeals entered on May 21, 1980.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported at 611 P.2d 1137 (Okla.Crim. 1980).

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on May 21, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> "* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *."

Article II, Section 21 of the Constitution of the State of Oklahoma provides in part:

"Nor shall any person be twice put in jeopardy of life or liberty for the same offense."

Article II, Section 20 of the Constitution of the State of Oklahoma provides in part:

"In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed or, where uncertainty exists as to the county in which the crime was committed, the accused may be tried in any county in which the evidence indicates the crime might have been committed. Provided, that the venue may be changed to some other county of the state, on the application of the accused, in such manner as may be prescribed by law."

Okla. Stat. tit. 22, § 124 (1971) provides:

"When a public offense is committed, partly in one county and partly in another county, or the acts or effects thereof, constituting or requisite to the offense, occur in two or more counties, the jurisdiction is in either county."

Okla. Stat. tit. 22, § 126 (1971) provides in part:

"The jurisdiction of an indictment or information:

"1. For forcibly and without lawful authority seizing and confining another, or inveigling or kidnapping him, with intent, against his will, to cause him to be secretly confined or imprisoned in this State, or to be sent out of the State, or from one county to another; or,

* * * *

"Is in any county in which the offense is committed or into or out of which the person upon whom the offense was committed, may, in the commission of the offense, have been brought or in which an act was done by the defendant in instigating, procuring, promoting, aiding or in being an accessory to the commission of the offense, or in abetting the parties concerned therein."

Okla. Stat. tit. 21, § 746 (1971) provides:

"Every offense prohibited in the last section [Okla. Stat. tit. 21, § 745 (1971), which defines Kidnapping for the Purpose of Extortion] may be tried in the county in which the crime may have been committed or in any county through which the person so seized, confined, inveigled or kidnapped shall have been taken, carried, or into which such person may be brought."

Okla. Stat. tit. 22, § 438 (1971) provides:

"The court may order two or more indictments or informations or both to be tried together if the offenses and the defendants, if there

> is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution was under such single indictment or information."

QUESTIONS PRESENTED FOR REVIEW

1. Whether the bar against double jeopardy precludes petitioner's prosecution for Murder in the Second Degree in one county where the State has previously prosecuted him for Kidnapping for the Purpose of Extortion in a second county when the matter arose out of the same transaction?

2. Whether a criminal defendant may invoke one constitutionally protected right to the exclusion of a second constitutionally protected right and claim reversible error as a result?

STATEMENT OF THE CASE

On March 30, 1975, Kurk Kendall Johnson (hereinafter referred to as petitioner) kidnapped Tulsa restauranteur Earl Edward Bell and attempted unsuccessfully to extort twenty thousand dollars ($20,000.00) from Bell's family for his safe return. On April 1, 1975, one day following his arrest, petitioner was charged by information in the District Court of Tulsa County (Case No. CRF-75-690) with the crime of Kidnapping for the Purpose of Extortion, pursuant to Okla. Stat. tit. 21, § 745 (1971).

On April 2, 1975, Earl Edward Bell's body was found near a road in Osage County. Bell had been shot twice in the head. On April 16, 1975, petitioner was charged by information in the District Court of Osage County (Case No. CRF-75-294) with the offense of Murder in the First Degree, pursuant to Okla. Stat. tit. 21, § 701.1(2) (Supp. 1973).[1]

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[1] In an effort to comply with this Court's decision in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972), reh. denied, 409 U.S. 902, 34 L.Ed.2d 164, 93 S.Ct. 89, 90 (1972), the Oklahoma Legislature pursued the extreme approach necessary to curb the unfettered discretion therein condemend by repealing the State's current capital punishment provisions and enacting Okla. Stat. tit. 21, § 701.1 et seq. (Supp. 1973), which made the assessment of the death penalty mandatory upon conviction for Murder in the First Degree. Section 701.1(2) provided:

> "Homocide, when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of

Preliminary hearings were held in the respective courts and petitioner was bound over for trial on both charges. On September 3, 1975, petitioner moved for a continuance[2] of the murder trial in Osage County until after the conclusion of the kidnapping trial in Tulsa County. Petitioner's motion was granted.

(Continued)

> any other human being, is murder in the first degree in the following cases:
>
> * * *
>
> "2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years; * * *."

This provision has since been repealed by Laws 1976, 1st Ex. Sess., c. 1 § 10 (eff. July 24, 1976), now codified as Okla. Stat. tit. 21, § 701.7 (Supp. 1976).

[2]The substance of petitioner's "Motion for Continuance And to Strike From Jury Docket" is as follows:

> "1. That the defendant will be tried in Tulsa County at approximately the same time on a charge of Kidnapping which charge arose out of the same indicent [sic] as the charge herein and, therefore, an impartial trial cannot be had at this time. That the trial in Tulsa County will be publicized in the newspapers, on television and on the radio and said publicity will cause an influence over the inhabitants of Osage County. That because of said fact the defendant will not be able to impanel a fair, impartial and unprejudiced jury at this time.
>
> "2. That the defendant's court appointed attorneys will have but a short period of time to evaluate the evidence presented at the trial in Tulsa County. That both charges arose out of the same incident and are, therefore, similar in evidence to be introduced at trial.
>
> "3. That it would be a hardship for the defendant to undergo two trials of such serious charges in such a short period of time.
>
> "4. That the United States Supreme Court has 'indicated' that it will rule sometime this fall on the constitutionality of the mandatory death sentence under the North Carolina murder statute. That the Oklahoma murder statute is similar to that of North Carolina's. That the ruling of the United States Supreme Court will affect the constitutionality of the Oklahoma murder statute. That to require the defendant to be tried under

On September 5, 1975, petitioner was found guilty by a Tulsa County District Court jury of the crime of Kidnapping for the Purpose of Extortion. Punishment was assessed at sixty (60) years in the custody of the State Department of Corrections.[3]

On October 28, 1975, petitioner filed a pro se pleading in the District Court of Osage County entitled "Petition For Writ of Prohibition or Petition For Writ of Habeas Corpus or Petition For Writ of Mandamus," alleging that a trial for Murder in the First Degree would violate his State and Federal constitutional rights to be free from multiple trials and multiple punishments, inasmuch as there was an identity of offenses between Murder in the First Degree and Kidnapping for the Purpose of Extortion. Prior to a disposition of the matter, petitioner also sought similar relief from the Oklahoma Court of Criminal Appeals. On December 15, 1975, the appellate court dismissed the alternative petitions. See Johnson v. The District Court of Osage County and/or the District Attorney of Osage County and/or the State of Oklahoma (Okla.Crim., Case No. O-75-739, an unpublished order entered December 15, 1975) (Appendix "B"). Thereafter, the District Court of Osage County also denied the requested relief.

On February 20, 1976, petitioner filed in the District Court of Osage County a "Plea of Former Jeopardy" asserting that his conviction for the crime of Kidnapping for the Purpose of Extortion was a bar to the pending prosecution for Murder in First Degree; the crimes not being separate and distinct offenses. Five days later, as a supplement to his Plea of Former Jeopardy, petitioner

(Continued)

> the statute without its constitutionality being determined would be a hardship on the defendant.
>
> "5. That this motion is not made for the purpose of delay, but in order that justice may be done, and that said continuance should be granted and ordered by the Court." (Case No. CRF-75-294; R. 27-29).

[3]Petitioner's conviction was subsequently affirmed by the Oklahoma Court of Criminal Appeals. See Johnson v. State, 554 P.2d 51 (Okla.Crim. 1976), cert. denied, 429 U.S. 943, 50 L.Ed.2d 314, 97 S.Ct. 364 (1976) (Appendix "A").

filed a motion to strike all references to the kidnapping from the charging portion of the Osage County information. Both the plea and the motion were overruled. (Case No. CRF-75-294, R. 76). Petitioner, acting both pro se and through his court appointed attorney, then sought a writ of mandamus from the Court of Criminal Appeals. In a per curiam opinion announced on June 24, 1976, that court vacated the trial court's ruling, holding that petitioner's "Plea of Former Jeopardy" and "Motion to Strike" should have been sustained. In its Order the court also stated:

> "However, we do find, as the Petitioner submits, that the previous conviction for Kidnapping for the Purpose of Extortion does not in any way prohibit a subsequent prosecution for Murder in the Second Degree, in violation of 21 O.S. Supp. 1971, § 701.2." (Emphasis added). Johnson v. Hampton, (Okla.Crim., Case No. O-76-150 at page 4, an unpublished opinion rendered June 24, 1976) (Appendix "C"). See Case No. CRF-75-294; R. 96.

Two weeks later, acting pro se, petitioner sought a rehearing in Case No. O-76-150 and/or a writ of prohibition. Petitioner, in a new double jeopardy argument relating only to multiple trials and not multiple punishments, contended that the State should be "collaterally estopped" from conducting a trial for Murder in the Second Degree arising out of the same facts and circumstances as the kidnapping. The Court of Criminal Appeals dismissed the petition for in the interim it had vacated the opinion it rendered in Johnson v. Hampton, (Okla.Crim., Case No. O-76-150) and directed that supplemental briefs be submitted. Thus, the petitioner's new double jeopardy argument was reduced to speculation and anticipation as to the court's ultimate decision in Case No. O-76-150. See Johnson v. Hampton (Okla.Crim., Case No. P-76-533, an unpublished order entered July 29, 1976) (Appendix "D").

On May 16, 1977, the Court of Criminal Appeals, in a split decision, denied petitioner's request for a writ of mandamus.[4] Johnson v. Hampton, 564 P.2d 641 (Okla.Crim. 1977) vacated 572 P.2d 1301 (Okla.Crim. 1978) (Appendix "E").

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[4]The Court of Criminal Appeals held:

> "The evidence in the kidnapping case, Johnson v. State, 554 P.2d 51 (F-76-179, August 26, 1976), established that Johnson

Petitioner next petitioned the United States Supreme Court for a writ of certiorari. In Johnson v. Hampton, 434 U.S. 947, 54 L.Ed.2d 307, 98 S.Ct. 471 (1977) (Appendix "F") this Court granted certiorari, vacated the May 16, 1977, decision of the Oklahoma Court of of Criminal Appeals denying mandamus, and remanded the case for further consideration in light of Brown v. Ohio, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977) and Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 471 (1977).

On remand the Court of Criminal Appeals granted a writ of prohibition, holding that the crime of Murder in the First Degree, as charged, necessarily included the lesser offense of Kidnapping for the Purpose of Extortion. The court further stated:

> "This order is made without prejudice to the trial of the said Kurk Kendall Johnson on any charge of homocide which the facts and justice may warrant, not inconsistent with the views expressed in Brown, v. Ohio and Harris v. Oklahoma, supra." Johnson v. Hampton, 572 P.2d 1301, 1302 (Okla.Crim. 1978) (Appendix "G").

(Continued)

> kidnapped his victim in hopes of extorting a sum of money from the victim's relatives. The objective of extortion changed to murder after the attempts to extort the money apparently failed. The evidence does not establish that the purpose of the kidnapping was murder, but only that the purpose became murder after Johnson's extortion attempts failed and certainly the murder would also at least close the mouth of the one who could surely lead to Johnson's apprehension. Different societal interests are protected by the statutory laws prescribing kidnapping for the purpose of extortion and homicide. Certainly then two separate offenses may be committed although the offenses are proximate in time.
>
> "Therefore, in the instant case Johnson may be prosecuted for Murder in the First Degree with the underlying felony being the commission of or the attempt to commit the offense of Kidnapping for the Purpose of Extortion, notwithstanding that he has been previously convicted of said underlying felony. No former jeopardy claim is sustainable as Murder in the First Degree is a separate and distinct offense protecting a different societal interest than Kidnapping for the Purpose of Extortion." Johnson v. Hampton, 564 P.2d 641, 643 (Okla.Crim. 1977).

The information in Case No. CRF-75-294 was then amended to Murder in the Second Degree[5] with all references to the kidnapping stricken.

Petitioner then again sought a writ of prohibition from the Court of Criminal Appeals to bar a trial for Murder in the Second Degree "on the basis of collateral estoppel and grounds of double jeopardy." On March 9, 1978, the appellate court entered its Order declining to assume jurisdiction and dismissing the petition. The court was of the opinion that under the authority of Brown v. Ohio, and Harris v. Oklahoma, supra, "the issue sought to be raised is properly reviewable on appeal." Johnson v. Hampton, (Okla.Crim., Case No. P-78-101, an unpublished order rendered March 9, 1978) (Appendix "H").

Petitioner was then tried and convicted by an Osage County jury of the crime of Murder in the Second Degree. Punishment was assessed at ten (10) years to life in the custody of the State Department of Corrections. On direct appeal the Court of Criminal Appeals affirmed petitioner's Judgment and Sentence. See Johnson v. State, 611 P.2d 1137 (Okla.Crim. 1980) (Appendix "I").

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[5]Pursuant to Okla. Stat. tit. 21, § 701.2 (Supp. 1973) (now repealed), which provided:

> "Homicide is murder in the second degree in the following cases:
>
> "1. When perpetrated without authority of law, and with a premeditated design to effect the death of a person, or of any other human being, but by an act not enumerated in the preceding section;
>
> "2. When perpetrated by an act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; or
>
> "3. When perpetrated without any design to effect death by a person engaged in the commission of any felony other than the felonious acts set out in Section 1 of this act."

ARGUMENT

I. PETITIONER WAIVED ANY CLAIM OF DOUBLE JEOPARDY (A) BY FAILING TO INVOKE THE PROPER APPELLATE PROCEDURE TO ADEQUATELY PROTECT HIS DOUBLE JEOPARDY GUARANTEES; (B) BY FAILING TO APPLY FOR A CHANGE OF VENUE FOR THE PURPOSE OF JOINING THE INFORMATIONS FOR TRIAL; AND (C) BY MOVING FOR AND RECEIVING A CONTINUANCE OF HIS MURDER TRIAL UNTIL HIS KIDNAPPING TRIAL HAD BEEN COMPLETED.

The focal point of petitioner's argument is the proper standard to be used in determining the validity of a double jeopardy claim. Petitioner contends that the proper standard is "the same transaction test" as opposed to "the same evidence test." However, petitioner fails to note that while the Oklahoma Court of Criminal Appeals did discuss in its opinion the applicability of both standards, the application of either standard was not dispositive of petitioner's double jeopardy claim. To the contrary, the Oklahoma Court held that petitioner had waived any claim of double jeopardy. See Johnson v. State, 611 P.2d 1137, 1145 (Okla.Crim. 1980) (Appendix "I"), citing Jeffers v. United States, 432 U.S. 137, 53 L.Ed.2d 168, 97 S.Ct. 2207 (1977). Therefore, the "proper standard" to be applied to pleas of former jeopardy is academic in the context of the present case.

A.

In Illinois v. Vitale, ____ U.S. ____, 65 L.Ed.2d 228, 100 S.Ct. ____ (1980), this Court again noted that the Double Jeopardy Clause of the Fifth Amendment affords criminal defendants two distinct protections. First, it guarantees that multiple punishments will not be inflicted for the same offense. And second, it protects a defendant from being forced to endure a second or series of prosecutions for the same offense. In Abney v. United States, 431 U.S. 651, 52 L.Ed.2d 651, 97 S.Ct. 2034 (1977), this Court observed that prosecutorial or judicial abuse of the first guarantee can be adequately vindicated on appeal following final judgment. The second aspect of double jeopardy protection would be lost, however, if a defendant were forced to "run the guantlet" a second time before an appeal could be taken. 432 U.S. at 661, 52 L.Ed.2d at 661. For this reason, the Court in Abney held that pretrial orders rejecting pleas of former jeopardy constitute "final

decisions" from which an appeal could be taken without violating the policy ban against piecemeal appeals.[6]

Prior to the Oklahoma Court of Criminal Appeals' initial decision in Johnson v. Hampton, (Okla.Crim., Case No. O-76-150, an unpublished order entered June 24, 1976, but later vacated) (Appendix "C"), petitioner's double jeopardy claims were premised on his contention that Kidnapping for the Purpose of Extortion was a lesser included offense of Murder in the First Degree, as that crime was then defined by the Oklahoma Legislature. These claims encompassed both aspects of Double Jeopardy Clause protection.[7] The pro se rehearing and/or writ of prohibition sought by petitioner in that case (though assigned Case No. P-76-533) (Appendix "D") was the first time petitioner raised a double jeopardy claim based solely on the aspect of multiple trials. Petitioner also sought a writ of prohibition founded on the same assertion in Johnson v. Hampton, (Okla.Crim., Case No. P-78-101, an unpublished order entered March 9, 1978) (Appendix "H"). As noted earlier, the Court of Criminal Appeals denied relief without reaching the merits in either instance. Only on petitioner's direct appeal from his conviction, after petitioner had endured a second prosecution, did the court address the merits of his argument.

It is the State's contention that petitioner should have availed himself of the direct appeal provisions set forth at Okla. Stat. tit. 22, § 1051 (1971), which, under Abney, would have mandated review by the Court of Criminal Appeals prior to trial. Instead, petitioner invoked the alternative procedure of requesting

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[6]Though the Court's decision addressed only the jurisdictional requisites of 28 U.S.C. § 1291, the reasoning in Abney should apply equally to Okla. Stat. tit. 22, § 1051 (1971). For as Mr. Chief Justice Burger wrote in Abney:

> "[I]f a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." (Emphasis the Court's). 431 U.S. at 662, 52 L.Ed.2d at 662.

[7]If two offenses are the same for purposes of barring consecutive sentences, they necessarily will be the same for purposes of barring successive prosecutions. Brown v. Ohio, 432 U.S. 161, 166, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977).

extraordinary relief which the appellate court, in its discretion, could and did decline to hear.

As this Court observed in Abney, the Fifth Amendment prohibition against multiple trials "protects interests wholly unrelated to the propriety of any subsequent conviction." 431 U.S. at 661, 52 L.Ed.2d at 661. Here, as in Abney, petitioner makes no challenge whatsoever to the merits of the State's case in his murder trial. The sole ground on which petitioner contests his conviction is the authority of the State of Oklahoma to hale him into court and prosecute him for the murder of Earl Edward Bell after already having prosecuted him for Bell's kidnapping. Yet, the fact that petitioner might have been forced to endure a second trial bears not at all on the propriety of petitioner's sentence.[8]

Thus, to enjoy full Double Jeopardy Clause protection, a defendant shoulders the burden of instituting a pretrial appeal of a denial of his plea of former jeopardy just as a defendant shoulders the burden of affirmatively pleading former jeopardy.[9]

> "[I]f a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." Abney v. United States, supra, 431 U.S. at 662. (Emphasis the Court's).

By failing to invoke the proper appellate procedure necessary to insure review of the trial court's decision, and necessary to fully preserve his constitutionally protected right, petitioner must be deemed to have waived any claim of fundamental error. For once petitioner's trial for Murder in the Second Degree had run its course, the protection against multiple trials conferred by the Double Jeopardy Clause, if applicable in this instance, was irreparably lost. Abney v. United States, supra. Compare

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[8]The Oklahoma Court of Criminal Appeals concluded that petitioner could be punished separately for Murder in the Second Degree and Kidnapping for the Purpose of Extortion, though it would have been preferable to have joined the issues for a single trial. Johnson v. State, 611 P.2d 1301 (Okla.Crim. 1980). See Okla. Stat. tit. 22, §§ 436-440 (1971); Dodson v. State, 562 P.2d 916 (Okla.Crim. 1977) (Brett, J., concurring). See also Whalen v. United States, ____ U.S. ____, 63 L.Ed.2d 715, 100 S.Ct. ____ (1980).

[9]See Okla. Stat. tit. 22, § 513(4) (Supp. 1976).

Franks v. Delaware, 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978) (Rehnquist, J., dissenting).

B.

The Bill of Rights embodied in Article II of the Constitution of the State of Oklahoma grants criminal defendants a number of protected rights, among which is the right to be speedily and publically tried in the county in which the crime was committed. See Okla. Const., art. 2, § 20. Once the information charging petitioner with the crime of Kidnapping for the Purpose of Extortion was properly filed in the District Court of Tulsa County, petitioner had the constitutional right to be tried by an impartial jury in that county. See Okla. Stat. tit. 21, § 746 (1971); Okla. Stat. tit. 22, §§ 124, 126(1) (1971). Similarly, petitioner had the constitutional right to be tried by an impartial jury in the District Court of Osage County once the original information charging Murder in the First Degree had been properly filed.

The State maintains that petitioner cannot exercise this personal right, guaranteed by the State Constitution, to the exclusion of another personal right, the double jeopardy protections guaranteed by both the State and Federal Constitutions, and claim that his choice resulted in reversible error of constitutional magnitude.

Nor can petitioner fail to exercise a constitutional right necessary to protect a second constitutional right and then claim he was unduly prejudiced by his own inaction. Under Okla. Const., art. 2, § 20, petitioner also had the constitutional right to apply for a change in venue; a right much broader than that conferred by statute to the State.[10] See State ex rel Young v. Warren, 536 P.2d 965 (Okla.Crim. 1975); Carle v. State, 34 Okla.Crim. 24, 244 P. 833 (1926). Petitioner had within his means the capability of avoiding exposure to multiple trials. Petitioner could have applied to the District Court of Tulsa County for a change of venue to Osage County for the purpose of joining the informations for

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[10]The prosecution or the court on its own motion can transfer venue only when venue has been impermissibly established in the first instance. See Okla. Stat. tit. 22, § 445 (1971).

trial.[11] See Okla. Stat. tit. 22, § 438 (1971). Having failed to seek a joinder of the charges, petitioner's objection to multiple trials must be deemed to have been waived.

C.

In Jeffers v. United States, supra, this Court was faced with the issue of whether the petitioner therein had waived a claim of former jeopardy by actively opposing a government motion to consolidate trials for two separate offenses arising out of the same basic transaction. In Jeffers, four members of the Court held that Jeffers had waived his claim of double jeopardy; four specifically dissented from that view; and one justice concurred in the judgment but on different gounds. Regardless of the specific positions maintained in Jeffers, no member of the Court expressly or impliedly held that a criminal defendant could not waive a double jeopardy claim.[12] At most, the dissenters in Jeffers held that petitioner Jeffers had not waived his claim according to the facts of that specific case.

Following this Court's ruling in Jeffers v. United States, Jeffers initiated a habeas corpus action in federal district court alleging ineffective assistance of counsel, and again raising claims that the trial court and prosecutor had abrogated a duty to advise him of the consequences of his opposition to a joinder of the indictments for trial. In addressing the issue, the District Court noted that a claim of double jeopardy can be waived by counsel and that a "tactical decision to oppose a single trial on both indictments would preclude him from invoking it." Jeffers v. United States, 461 F.Supp. 300, 305 (N.D. Ind. 1978).

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[11] On petitioner's direct appeal the Court of Criminal Appeals noted that had petitioner raised the double jeopardy issue prior to the kidnapping trial, the kidnapping charge could have been dismissed in Tulsa County and refiled by the District Attorney in Osage County so that the two charges could have been tried together. Though this could have avoided the issue of multiple trials, the combined actions of the District Attorneys were discretionary and could not be enforced by mandamus.

[12] See also Williams v. Oklahoma, 358 U.S. 576, 3 L.Ed.2d 516, 79 S.Ct. 421 (1959), reh. denied, 359 U.S. 956, 3 L.Ed.2d 763, 79 S.Ct. 737 (1959); United States v. Young, 503 F.2d 1072 (3d Cir. 1974); United States v. Hill, 473 F.2d 759 (9th Cir. 1973); Caballero v. Hudspeth, 114 F.2d 545 (10th Cir. 1940); Stockton v. State, 508 P.2d 663 (Okla.Crim. 1973).

In the instant case petitioner, by his actions and omissions, also waived any claim of former jeopardy. Petitioner was first charged in Tulsa County with the crime of Kidnapping for the Purpose of Extortion. One day following the filing of the kidnapping charge, the body of Earl Edward Bell was found in Osage County; hence, the delayed filing of the separate charge of Murder in the First Degree. The lodging of both charges predated this Court's decisions in Harris v. Oklahoma and Brown v. Ohio, supra, and were consistent with the holdings of Williams v. State, 321 P.2d 990 (Okla.Crim. 1957) and Williams v. Oklahoma, 358 U.S. 576, 3 L.Ed.2d 516, 79 S.Ct. 421 (1959) (which involved separate prosecutions and punishments for a kidnapping-murder occurring in separate counties).[13]

In Jeffers v. United States, 432 U.S. 137, 150 n. 15, 53 L.Ed.2d 168, 179 n. 15, 97 S.Ct. 2207 (1977), the plurality held:

> "Unless it is plain that two offenses are 'the same' for double jeopardy purposes, the parties and the court should be entitled to assume that successive prosecutions are an available option. This assumption would only be reinforced if the defendant affirmatively asked the court to require two proceedings, and in connection with his request he actively sought postponement of the second trial, as Jeffers did."

As noted earlier, the instant petitioner, like Jeffers, actively sought and received a postponement of his second trial. It was not until after the first trial had been completed, and he had been found guilty of kidnapping Earl Edward Bell, that petitioner voiced his double jeopardy plea. And even then it was founded primarily on his right to be free from multiple punishments as opposed to multiple trials.[14]

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[13]The Oklahoma Court of Criminal Appeals relied on Williams v. State, and Williams v. Oklahoma, supra, in denying mandamus in Johnson v. Hampton, 564 P.2d 641 (Okla.Crim. 1977) (Appendix "E"), vacated 572 P.2d 1301 (Okla.Crim. 1978). See also Stockton v. State, 508 P.2d 663 (Okla.Crim. 1973) which held that the Double Jeopardy Clause did not prohibit separate prosecutions and punishments for kidnapping (Tulsa County) and rape (Creek County) arising out of the same incident.

[14]Petitioner's first double jeopardy claim, filed pro se, was predicated on the fact that Kidnapping for the Purpose of Extortion was an essential element of the crime of Murder in the First Degree, as then defined by Okla. Stat. tit. 21, § 701.1(2) (Supp. 1973). See Case No. CRF-75-294; R. 31-34.

Unlike the government in Jeffers, the State did not seek a joinder of the charges against petitioner due to the barrier imposed by Okla. Stat. tit. 22, § 445 (1971). Nonetheless, petitioner, like Jeffers, did affirmatively seek separate proceedings by virtue of his course of action. Petitioner's failure to seek a change of venue along with his request that the murder trial be postponed, can be likened to the course of action adopted by Jeffers.

Petitioner was "under an obligation to preserve his double jeopardy point properly, by alerting both court and prosecution to the existence of a complex, unsettled issue." Jeffers v. United States, 432 U.S. at 137 n. 15, 53 L.Ed.2d at 179 n. 15.

> "The right to have both charges resolved in one proceeding, if it exists, was petitioner's; it was therefore his responsibility to bring the issue to the District Court's attention." Jeffers v. United States, 432 U.S. at 154 n. 22, 53 L.Ed.2d at 182 n. 22.

No action of the State contributed to the separate prosecutions other than perhaps failing to discover the body prior to the filing of the kidnapping charge, and then filing the murder charge in accordance with state law regarding jurisdiction and venue. Since petitioner persuaded the District Court of Osage County to postpone his trial for murder, any right that he might have had against consecutive trials must be deemed to have been waived.

II. NO SUBSTANTIAL FEDERAL QUESTION EXISTS FOR (1) "THE SAME TRANSACTION TEST" DOES NOT APPLY, AND (2) APPLICATION OF "THE SAME TRANSACTION TEST" WOULD NOT YIELD A DIFFERENT RESULT.

Petitioner urges this Court to discard "the same evidence test," see Blockburger v. United States, 284 U.S. 299, 96 L.Ed.2d 306, 52 S.Ct. 180 (1932), in favor of "the same transaction test." Relying primarily on Mr. Justice Brennan's dissent in Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970), petitioner argues at pages 10 and 11 of his petition:

> "In the instant case, the evidence in the Tulsa County kidnapping case and the evidence in the Osage County second degree murder case were [sic] virtually identical. While the offenses are different, and the elements there are not the same, the evidence was the same, as was the transaction. It was but one criminal episode." (Emphasis added).

The State respectfully submits that there exists no substantial federal question which would warrant review by this Honorable Court. Though petitioner's contention on its surface appears to reach constitutional dimension, the disposition of petitioner's claim rests on state evidentiary and procedural law. Application of "the same transaction test" to the instant case would not yield a different result.

Dissenting in Ashe v. Swenson, supra, Mr. Justice Brennan wrote:

> "In my view, the Double Jeopardy Clause requires the prosecution, except in limited circumstances, to join at one trial all the charges against a defendant that grow out of a single cirminal act, occurrence, episode or transaction." 397 U.S. at 453-454, 25 L.Ed.2d at 481. (Emphasis added).

In footnote 7 to his opinion, Justice Brennan offered two examples of "limited circumstances" which would constitute exceptions to a single trial requirement:

> "For example, when a crime is not completed or discovered, despite diligence on the part of the police, until after the commencement of a prosecution for other crimes arising from the same transaction, an exception to the 'same transaction' rule should be made to permit a separate prosecution. * * * Another exception would be necessary if no single court had jurisdiction of all the alleged crimes." 397 U.S. at 453 n. 7, 25 L.Ed.2d at 481 n. 7.

The instant case envelopes both exceptions. Petitioner was charged with Earl Edward Bell's kidnapping in the District Court of Tulsa County. Not until after this charge was lodged did police discover that Bell had also been murdered. The State then charged petitioner with Bell's murder in the District Court of Osage County because the District Court of Tulsa County did not have jurisdiction. Thus, even under Mr. Justice Brennan's view[15] of "the same evidence test," petitioner could constitutionally be subjected to successive prosecutions and multiple punishments under "the same transaction test."

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[15] See also Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912 (1977) (Brennan, J., dissenting); Brown v. Ohio, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977) (Brennan,J., dissenting); Thompson v. Oklahoma, 429 U.S. 1053, 50 L.Ed.2d 770, 97 S.Ct. 768 (1977) (Brennan,J., dissenting); Harris v. Washington,

The fatal flaw in petitioner's application of "the same transaction test" is equating repetition of proof with repetition of evidence. In essence, petitioner does not seek protection from a relitigation of factual issues previously determined, but rather he seeks a limitation on the prosecution's quantum of proof. In so doing, petitioner has expanded and elevated the evidentiary policy ban on the use of other crimes evidence to the level of an absolute constitutional barrier under the guise of double jeopardy protection.

Though the kidnapping was a continuous crime which ended with Bell's murder, the course of petitioner's conduct was divisible. See Blockburger v. United States, supra; Stockton v. State, 509 P.2d 153 (Okla.Crim. 1973); Lawson v. State, 484 P.2d 901 (Okla. Crim. 1971), Ryan v. State, 473 P.2d 322 (Okla.Crim. 1970); Okla. Stat. tit. 21, § 11 (1971). There was no overlap in either the content or timing of the essential elements of the two offenses. There was a separation of time, location and objective. Compare Smith v. State, 486 P.2d 770 (Okla.Crim. 1971).

Proof of the kidnapping was not not needed to prove the charge of Murder in the Second Degree. See Harris v. Oklahoma, supra. However, evidence of the kidnapping did shed relevant light on the charge of Murder in the Second Degree. See Okla. Stat. tit. 12, § 2404(b) (Supp. 1978)[16]; F.R.Cr.P. 404(b). But, the crucial point is the necessary evidence of both crimes differed. See Stockton v. State, supra at 155. Though there was an overlap of evidence, there was no overlap of proof. See Iannelli v. United States, 420 U.S. 770, 785 n. 15, 43 L.Ed.2d 616, 627 n. 17, 95 S.Ct. 1284 (1975). See also Illinois v. Vitale, ____ U.S. ____, 65 L.Ed.2d 228, 236, 100 S.Ct. ____ (1980). There was no relitigation of ultimate issues crucial to both offenses. Cf. Harris v. Washington,

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(Continued) 404 U.S. 55, 30 L.Ed.2d 212, 92 S.Ct. 183 (1971); Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970) (Brennan, J., concurring); Abbate v. United States, 359 U.S. 187, 3 L.Ed.2d 729, 79 S.Ct. 666 (1959); Gore v. United States, 357 U.S. 386, 2 L.Ed.2d 1405, 78 S.Ct. 1280 (1958) (Douglas, J., dissenting).

[16]Okla. Stat. tit. 12, § 2404(b) (Supp. 1978) is consistent with Oklahoma case law. Burks v. State, 594 P.2d 771 (Okla.Crim. 1979).

404 U.S. 55, 30 L.Ed.2d 212, 92 S.Ct. 183 (1971); Gore v. United States, 357 U.S. 386, 396, 2 L.Ed.2d 1405, 1412, 78 S.Ct. 1280 (1958) (Douglas, J., dissenting).

A review of petitioner's case will reveal that a single criminal act was not divided into "temporal or spatial units." See Brown v. Ohio, 432 .S. 161, 169, 53 L.Ed.2d 187, 198, 97 S.Ct. 2221 (1977). To the contrary, two separate and distinct offenses, unique in time, location and objective, occurred in a successive, though divisible manner. Successive prosecutions in this case were not an attempt by the State to increase petitioner's punishment for a single criminal episode, see Iannelli v. United States, supra, 420 U.S. at 793, 43 L.Ed.2d at 632 (Douglas, J., dissenting), but rather an attempt to punish petitioner, in accordance with his state constitutional and statutory rights, for the more heinous of two criminal occurrences.

CONCLUSION

For these reasons, the respondent State of Oklahoma respectfully submits that a writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA)
) ss:
COUNTY OF OKLAHOMA)

I, Timothy S. Frets, depose and say that I am an attorney in the office of Jan Eric Cartwright, attorney of record for the State of Oklahoma, respondent herein, and that on October 21, 1980, pursuant to Rule 33, of the Rules of the Supreme Court, I served one

copy of the foregoing brief by mailing the copies in a duly addressed envelope, with First Class postage prepaid, to the following:

Billy Leon Heskett
304 First National Bank Bldg.
Pawhuska, OK 74056

All parties required to be served have been served.

Timothy S. Frets
TIMOTHY S. FRETS

Subscribed and sworn to before me this 21st day of October, 1980.

L. Kay Brown
Notary Public

My Commission Expires:

June 26, 1982

(1974); *Carney v. State*, Okl.Cr., 406 P.2d 1003 (1965).

For the above and foregoing reasons it is the opinion of this Court that the judgment and sentence appealed from should be and the same is, hereby, *AFFIRMED*.

BRETT, P. J., and BLISS, J., concur.

Kurk Kendall JOHNSON, Appellant,
v.
The STATE of Oklahoma, Appellee.
No. F-76-179.

Court of Criminal Appeals of Oklahoma.
Aug. 26, 1976.

Certiorari Denied Nov. 8, 1976.
See 97 S.Ct. 384.

Defendant was convicted before the District Court, Tulsa County, Glen Dale Carter, J., of kidnapping for extortion, and he appealed. The Court of Criminal Appeals, Bussey, J., held that police officers had probable cause based on exigent circumstances to open trunk of defendant's car and search same in hopes of saving human life and that items seized in plain view thereof were thus properly admitted; that even if search was unconstitutional and therefore items seized inadmissible, there was ample evidence from which court and jury could have found defendant guilty; in light of all precautions taken by trial court, evidence of kidnapping victim's death was properly admitted, and that defendant's sentence was not so excessive as to require modification.

Affirmed.

1. Searches and Seizures ⇐3.3(6)

Although bench warrant for minor traffic offense did not justify search of trunk of defendant's automobile, that did not necessarily mean that search itself of automobile conducted when police officers went to defendant's home with that traffic warrant and picked him up as suspect in kidnapping was improper or unconstitutional.

2. Searches and Seizures ⇐7(1)

Relevant test with respect to legality of search was not whether it was reasonable to procure search warrant, but whether search was reasonable.

3. Searches and Seizures ⇐3.3(1)

One exception to general search warrant rule is situation where exigent circumstances or state of exigency exists.

4. Criminal Law ⇐394.4(12)
Searches and Seizures ⇐3.3(7)

Police officers, who had information that elderly and ill man had been kidnapped and was being held in trunk of automobile and that defendant's voice had been identified as voice on tapes demanding ransom and who, upon arriving at residence of defendant with traffic warrant and to pick him up as suspect in kidnapping, at time when kidnapping was 24 hours old and emergency situation was at hand, had opportunity to observe his demeanor and behavior and to realize that one of "drop" locations was only few hundred yards from defendant's apartment, had probable cause based on exigent circumstances to open trunk of defendant's car and search same in hopes of saving human life, and items seized in plain view thereof were thus properly admitted in evidence in kidnapping for extortion prosecution. 21 O.S.1971, § 745.

5. Criminal Law ⇐1169.2(5)

Even if search of trunk of defendant's car, conducted when police officers went to his home with traffic warrant and to pick him up as suspect in kidnapping, was unconstitutional and therefore items seized therein inadmissible, there was ample evidence from which court and jury could have found defendant guilty of offense of kidnapping for extortion and thus, the admission of the seized items was harmless error. 21 O.S.1971, § 745.

APPENDIX "A"

6. Kidnapping ⇐5

Evidence of kidnapping victim's daughter, who testified, inter alia, that after her father failed to return home after work, she began to receive telephone calls from person she identified as "black male" demanding ransom for safe return of her father and that she went to three different locations in attempt to make "drops" of money demanded, and testimony of defendant's brother that defendant showed him man in back of defendant's car and identified him as white male, that defendant related to him that he was going to hurt the man and try to get some money, and that defendant owned rifle of type thought to have been used to kill victim, standing alone constituted prima facie case in prosecution for kidnapping for extortion. 21 O.S.1971, § 745.

7. Criminal Law ⇐369.2(1)

In situation where evidence of other crimes is sought to be admitted, trial court must weigh probative value of evidence with any prejudicial effect that it might have.

8. Criminal Law ⇐673(5)

In light of all precautions taken by trial court with respect to reference to death of victim, in prosecution for kidnapping for extortion, to wit, admonishment to state, subsequent instruction that jury must not consider any evidence concerning any other alleged offense that may have been committed by defendant except insofar as it tended to prove that defendant committed offense charged, and probative value of evidence which tended to connect defendant with crime, evidence of death of victim, for which separate murder case was pending, was properly admitted. 21 O.S.1971, § 745.

9. Kidnapping ⇐6

Considering all facts and circumstances, defendant's sentence to 60 years' imprisonment upon his conviction of kidnapping for extortion, pursuant to statute setting punishment for crime of kidnapping for purpose of extortion at not less than ten years, was not so excessive as to require modification. 21 O.S.1971, § 745.

An appeal from the District Court, Tulsa County; Glen Dale Carter, Judge.

Kurk Kendall Johnson, appellant, was convicted of the offense of Kidnapping for Extortion; was sentenced to sixty (60) years' imprisonment, and appeals. Judgment and sentence AFFIRMED.

Leslie R. Earl, Public Defender, Pete Silva, Jr., Asst. Public Defender, Tulsa County, for appellant.

Larry Derryberry, Atty. Gen., Robert L. McDonald, Asst. Atty. Gen., Toby Mash, Legal Intern, for appellee.

OPINION

BUSSEY, Judge.

Appellant, Kurk Kendall Johnson, hereinafter referred to as defendant, was charged, tried and convicted in the District Court, Tulsa County, Case No. CRF–75–690, for the offense of Kidnapping for Extortion, in violation of 21 O.S.1971, § 745. The jury assessed punishment at sixty, (60) years in the custody of the Department of Corrections, for which on the 19th day of September, 1975, judgment and sentence was pronounced in accordance with the jury verdict. From said judgment and sentence the defendant has filed this timely appeal.

The State first called Celia Nading. She stated her father was Earl Bell and that he was the assistant manager for Picadilly Cafeteria in Tulsa, Oklahoma. She testified that her father had gone to work on the 30th of March, 1975, and had failed to return home at his usual hour. She and her mother became worried and began to look for him at approximately 11:00 p. m. on that date. They found his automobile parked near the Picadilly Cafeteria, but were unable to locate Mr. Bell. They reported same to the Tulsa Police. Upon returning back to the home, the witness testified that she began to receive telephone

calls from a person she identified as a "black male," demanding $20,000.00 for the safe return of her father. She stated that in cooperation with the Tulsa Police Department she went to three different locations within the City of Tulsa, Oklahoma, in attempt to make "drops" of the ransom money demanded. She further identified a voice on a tape recording which had been placed on her mother's phone with her mother's permission, as the voice of the person who had made the telephone calls to her demanding the money. She testified she never saw her father again alive.

The State next called Tulsa Police Officer Carroll Gatlin. Officer Gatlin testified that he had been assigned to the Bell case on March 31, 1975. He further testified that he went to the defendant's residence in the City of Tulsa with a traffic warrant and to pick him up as a suspect in the Bell kidnapping. He further testified that he had information via voice identification that the defendant was the person involved in the kidnapping. The officer then testified that along with two other police officers he proceeded to open the trunk of defendant's car after obtaining the keys from defendant's wife. The officer testified that the reason for opening the trunk was to look for Mr. Bell, and if he was in the trunk to rescue him and thus save his life since Mr. Bell was in his 60's and in ill health. Upon opening the trunk the officers discovered a .22 caliber rifle and pry marks on the inside of the trunk.

The next witness called on behalf of the State was a William Johnson. Mr. Johnson testified that he was a brother of the defendant. He identified the defendant. Mr. Johnson testified that on or about the 30th day of March, 1975, in the late evening hours or early morning hours of March 31, 1975, his brother, the defendant, showed him a man in the back of defendant's car. The witness identified the man as a white male. The witness further stated that defendant related to him that he was "going to hold the man and try to get some money." The witness also testified that to his knowledge his brother owned a .22 caliber rifle which was partially wrapped with black tape.

The State next called Tulsa Police Officer Tom Lewellyn. Officer Lewellyn testified as to the chain of custody regarding the gun found in the trunk of the defendant's car. The witness also testified as to the chain of custody concerning two .22 caliber cartridges found near the scene where Mr. Bell was discovered. The witness also identified some leaden projectiles taken from the body of Mr. Bell.

The next witness for the State was Tulsa Police Officer Roy Goodenough. Officer Goodenough stated that some of the tape found around the neck of Mr. Bell's body was similar to the tape which was found as designs on defendant's automobile.

The next witness for the State was agent Robert Seibert of the Federal Bureau of Investigation. This witness was qualified as a ballistics expert and testified that the cartridges found near the body of Mr. Bell were fired by the .22 rifle which had been found in defendant's car, exclusive of all other weapons in the world. He further testified that the leaden projectiles recovered from the body of Mr. Bell were too mutilated for definite identification but were not inconsistent with projectiles fired from the defendant's weapon.

[1–6] For his first assignment of error the defendant alleges that the trial court erred in failing to sustain defendant's motion to suppress items obtained during the illegal search of defendant's automobile, more particularly, the trunk compartment of said automobile. The defendant argues that this was a warrantless search without probable cause and that if there had been probable cause there was ample time for the officers to have obtained a search warrant. The defendant urges that in no way will a bench warrant for a minor traffic offense justify a search of the trunk of a defendant's automobile. With this last statement we wholeheartedly agree, how-

ever, this does not necessarily mean that the search itself was improper or unconstitutional. The Attorney General does not rely on a custodial arrest pursuant to a bench warrant to justify the opening of the trunk of defendant's automobile, but rather on the exigent circumstances then and there existing. "It is argued that the searching officers had time and opportunity to procure a search warrant prior to the search, and for this reason the search in question was illegal. It has been decided that this naked fact alone does not render the search of an automobile illegal." *Jenkins v. State*, 116 Tex.Cr. 374, 32 S.W.2d 848 (1930). See also, *United States v. Roberts*, D.C., 90 F.Supp. 718 (1950). Therefore, the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. One of the exceptions to the general search warrant rule is the situation where exigent circumstances or a state of exigency exists. "As a general rule the facts preceding a search must present sufficient facts to warrant an officer to reasonably infer contraband is within the vehicle. Further, there must be exigent circumstances which justify the officer to make the search without a warrant. The circumstances generating probable cause may, however, consist of a chain of ambiguous innocent activities which coupled together would lead a reasonable officer to believe contraband is within a vehicle." *Gonzales v. State*, Okl.Cr., 525 P.2d 656 (1974). In the present case the officers had information that an elderly and ill man had been kidnapped and was being held in the trunk of an automobile. The officers had further information that the defendant's voice had been identified as the voice on the tapes demanding the ransom. Time was of the essence. Evidence shows that March 30th and 31st were cold and blustery days in the City of Tulsa, Oklahoma. At the time the officers reached the residence of the defendant, the kidnapping was at that time 24 hours old. An emergency situation was at hand. In *State v. Davidson*, 44 Wis.2d 177, 170 N.W.2d 755 (1969), the Supreme Court of Wisconsin recognized an inherent right of law enforcement officers to act promptly when the exigency of the situation calls for immediate investigation. "They had the responsibility, as well as the right, as law enforcement officers to enter the premises and were not required to seek and secure a search warrant before so doing." Upon arriving at the residence of the defendant, the officers had an opportunity to observe his demeanor and behavior and to realize that one of the "drop" locations was only a few hundred yards from the defendant's apartment. Armed with this information we find the officers had probable cause based on exigent circumstances to open the trunk of defendant's car and search same in hopes of saving a human life. The evidence shows that upon opening the trunk in the search for the victim of the kidnapping, the items seized were thus in plain view. "For the initial intrusion that brings the police within plain view of search and an article is found, not supported by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate." *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Furthermore, the Attorney General argues that even if the search in the above case was unconstitutional and therefore the items seized inadmissible there was ample evidence from which the court and jury could have found the defendant guilty of the above offense. While we have found no error in the above described search and seizure, we must also agree with the Attorney General's argument in this respect. The evidence of the victim's daughter and that of the defendant's brother standing alone would constitute a prima facie case. Recently, in *Duke v. State*, Okl.Cr., 548 P.2d 230 (1976), this Court said:

". . . An examination of the entire record reveals that sufficient competent evidence was presented at trial to support a verdict of guilty. We are also of

the opinion that even if the evidence discovered during the contemporaneous search of the automobile should have been suppressed, there was still sufficient competent evidence presented at trial to support a finding of guilt beyond a reasonable doubt. We therefore find this assignment of error to be without merit."

Because of the two reasons stated above we find the defendant's first assignment of error to be without merit.

[7, 8] The defendant next complains that the trial court erred in failing to overrule defendant's motion in limine. The defendant sought by a motion in limine to require the court to limit the State's witnesses so as to exclude the reference to the death of the victim. A murder case at that time was pending against the defendant for said death. This motion was overruled. However, the trial court recognized the potential prejudicial effect of an improper evidence being brought in which would point to other crimes the defendant may have committed, and thereupon admonished the State to caution its witnesses to stay within the limits of propriety. More important still the court also granted defendant's requested instruction number 1, which reads as follows:

"[T]he Court instructs you that you must not consider any evidence of or concerning any other alledged offense that may have been committed by the defendant except insofar as it tends to prove that the defendant committed the offense charged . . ."

The District Attorney had argued at the pretrial motion hearing on the motion in limine that it was necessary to discuss the body of the victim in order that they might tie in the projectiles recovered from his body with the .22 caliber rifle found in the defendant's trunk. The court sustained the argument of the District Attorney, stating that this was a proper element in the identification of the defendant as being connected with the crime. In *Worchester v. State*, Okl.Cr., 536 P.2d 995 (1975), this Court held that evidence of a beating administered by the defendant was admissible to establish identity of the defendant who committed a burglary. Such again was the holding in *Pruitt v. State*, Okl.Cr., 518 P. 2d 1114 (1974). We find no indication in the record that the State purposely violated the trial court's ruling to hold the evidence of murder solely for the purpose of identification of the defendant. In such a situation the trial court must weigh the probative value of the evidence with any prejudicial effect that it might have. See, *Harris v. State*, Okl.Cr., 450 P.2d 857 (1969). In light of all the precautions taken by the court, to wit: the admonishment to the state; the subsequent instruction; and, the probative value of the evidence which tended to connect the defendant with the crime, we find that the evidence was properly admitted.

[9] For his final assignment of error the defendant urges that the sentence imposed by the trial court is excessive. The defendant specifically urges that the excessive sentence was caused by the evidence of other crimes admitted into trial and by other prejudicial remarks and evidence against the defendant at said trial. We find this argument without merit. Title 21 O.S.1971, § 745, sets the punishment for the crime of kidnapping for the purpose of extortion at not less than ten years. In *Flowers v. State*, 93 Okl.Cr. 27, 258 P.2d 841 (1951), this Court looked at the maximum sentence the convicted kidnapper could have gotten and ruled that his actual sentence of a set number of years was not excessive. In *Dyer v. State*, Okl.Cr., 536 P.2d 1317 (1975), this Court was confronted with a fifty year sentence for kidnapping. In that case we held:

"Regarding the punishment assessed by the jury, it cannot be said that it was excessive. The sentence assessed the defendant was within the limits prescribed by law. This Court cannot conscientiously say that under all the facts and circumstances the sentence is so exces-

sive as to shock the conscience of the Court. . . ." (Citation omitted)

Considering all the facts and circumstances in this case we hold that this sentence is not so excessive as to require modification.

Having found no error which would justify the reversal or modification of the sentence imposed, we hold that the judgment herein rendered should be and, hereby is, *AFFIRMED*.

BRETT, P. J., and BLISS, J., concur.

Roger Edward McFARLIN, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. O-76-166.

Court of Criminal Appeals of Oklahoma.

Aug. 13, 1976.

Defendant appealed an order of the District Court, Okmulgee County, John Maley, J., revoking his suspended sentence and imposing a two-year term of imprisonment. The Court of Criminal Appeals, Bussey, J., held that the true test in the case was not whether defendant violated each and every element of the formal complaint, but rather whether or not there was competent evidence from which the court could find that defendant had violated the terms and conditions of his probation; that evidence supported a finding that defendant had violated the rules and conditions of his probation; and that defendant was not denied his constitutional rights in connection with the previous procedure whereby he was certified to stand trial as an adult.

Affirmed.

Brett, P. J., concurred in result.

1. Criminal Law ⇐982.9(5)

Fact that district attorney attached formal criminal information, charging defendant with malicious injury to property, to application for revocation of suspended sentence based on alleged violation by defendant of conditions of his probation did not mean that State was required to prove each and every element of such offense beyond reasonable doubt; "true test was whether there was competent evidence from which court could find that defendant had violated terms and conditions of his probation.

2. Criminal Law ⇐1147

Where there is competent evidence, preponderance of which shows that defendant violated rules and conditions of his probation, decision of trial court revoking probation will not be reversed unless there is obvious abuse of discretion.

3. Criminal Law ⇐982.9

Decision to grant probation lies with trial court and thus decision to revoke also lies with trial court, which may do so in its sound discretion and accord with statutory requirements and considerations of fundamental fairness.

4. Criminal Law ⇐1158(1)

In proceedings to revoke suspended sentence on basis of, inter alia, allegations that defendant violated conditions of his probation by committing offense of assault and battery with dangerous weapon, question of who was aggressor was question of fact to be determined by trial judge.

5. Criminal Law ⇐982.9(5)

Evidence, in proceedings for revocation of suspended sentence based on allegations that defendant had violated rules and conditions of his probation by committing offenses of malicious injury to property and assault and battery with dangerous weapon, supported finding that defendant had violated rules and conditions of his probation. 21 O.S.1971, § 1760.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KURK KENDALL JOHNSON,

Petitioner,

-vs-

THE DISTRICT COURT OF OSAGE COUNTY, AND/OR THE DISTRICT ATTORNEY OF OSAGE COUNTY, OR THE STATE OF OKLAHOMA, ET AL,

Respondents.

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
DEC 15 1975
Ross N. Lillard, Jr.
CLERK

No. O-75-739

ORDER DECLINING TO ASSUME ORIGINAL JURISDICTION AND ORDER DISMISSING PETITION FOR WRIT OF PROHIBITION OR IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS OR IN THE ALTERNATIVE, PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Kurk Kendall Johnson, has filed in this Court a pleading entitled Petition for Writ of Prohbition or Petition for Writ of Mandamus and/or Petition for Writ of Habeas Corpus praying that this Court assume original jurisdiction. The Petitioner alleges that he was convicted for the crime of Kidnapping for Extortion in the District Court of Tulsa County, Case No. CRF-75-690, and pursuant thereto was sentenced to a term of sixty (60) years imprisonment on the 19th day of September, 1975. Petitioner further alleges that the State of Oklahoma is proceeding in CRF-75-294, in which case the Petitioner is charged with Murder in the First Degree, allegedly committed during the commission of the crime of Kidnapping for Extortion in CRF-75-690, and thus the Petitioner is being placed in double jeopardy. Petitioner further contends that he has filed a petition for writ of habeas corpus or petition for writ of prohibition or petition for writ of mandamus in the District Court, Osage County, on the 28th day of October, 1975, in Case No. CRF-75-294, requesting appropriate relief and that the same has not been acted upon at this time.

The writ of prohibition may not issue to prevent inferior courts from erroneously exercising jurisdiction, but only to prohibit proceedings as to which an inferior tribunal is wholly without jurisdiction, or threatens to act in excess of jurisdiction. See State ex rel. Fallis v. Caldwell, Okl. Cr., 498 P.2d 426 (1972). We are of the opinion that the facts and circumstances as herein presented are not sufficient to invoke this Court's jurisdiction in a request for a writ of prohibition. For this reason, the petition for writ of prohibition will be dismissed.

We have further held that the scope of habeas corpus inquiry is limited to a determination of whether the trial court has jurisdiction of the subject matter, jurisdiction of the person, and authority under the law to pronounce judgment and sentence. See Myers v. State, Okl. Cr., 374 P.2d 928 (1962). We note the request in the instant petition is not within the purview of habeas corpus relief. The Petitioner is now incarcerated under a valid judgment and sentence. For this reason, the petition for writ of habeas corpus will be dismissed.

APPENDIX "B"

We lastly turn to the consideration of the instant petition as a petition for writ of mandamus concerning the allegation that a similar petition was filed in the District Court of Osage County and that the same has not been acted upon at this time. We need only observe that the similar petition was filed in the District Court of Osage County on October 28, 1975, and, although not having been acted upon at this time, we do not find that at the present time an unreasonable amount of time has expired between the filing of the petition and the Petitioner's reques[illegible] mandamus in this Court. For this reason, the petition for writ of mandamus will be dismissed. However, this will not preclude the Petitioner from seeking further relief in this Court if the District Court, Osage County, fails to act upon the petition filed in that Court in CRF-75-294 on October 28, 1975, within a reasonable amount of time from this date.

IT IS, THEREFORE, THE ORDER OF THIS COURT that the petition for writ of prohibition or in the alternative petition for writ of habeas corpus or in the alternative petition for writ of mandamus be, and hereby is, dismissed.

WITNESS OUR HANDS, and the Seal of this Court, this 15th day of December, 1975.

TOM BRETT, PRESIDING JUDGE

HEZ J. BUSSEY, JUDGE

C. F. BLISS, JR., JUDGE

ATTEST:

CLERK

JUL 2 1976
HELEN JOHNSON CHRISTENSON, Court Clerk
By ..... Deputy

Cr-75-294

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KURK KENDALL JOHNSON,

Petitioner,

-vs-

DON H. HAMPTON, District Judge, Tenth Judicial District, State of Oklahoma,

Respondent.

FOR PUBLICATION

FILED
COURT OF CRIMINAL APPEALS
OF OKLAHOMA
JUN 24 1976
Ross N. Lillard, Jr.
CLERK

No. O-76-150

AUTHORIZED FOR FILING
JUN 24 1976
COURT OF CRIMINAL APPEALS

-OPINION-

PER CURIAM:

Petitioner was charged in the District Court, Tulsa County, Case No. CRF-75-690, for the offense of Kidnapping for the Purpose of Extortion in violation of 21 O.S.1971, § 745. Thereafter, on the 16th day of April, 1975, Petitioner was charged in the Osage County District Court, Case No. CRF-75-294, for the offense of Murder in the First Degree in violation of 21 O.S.Supp.1973, § 701.2. Subsequent thereto the Petitioner was tried and convicted as charged in the Tulsa County District Court and pursuant thereto was sentenced for a term of imprisonment of Sixty (60) years. To the charge of Murder in the First Degree filed in the Osage County District Court, thd Petitioner entered a plea of former jeopardy, supplemented with a Motion to Strike, pursuant to 22 O.S.1971, § 513. Upon hearing, the above named Respondent overruled the Motion which sought to strike the following words from the Osage County Information:

> ". . . said acts and killing being perpetrated by the said Kurk Kendall Johnson pursuant to, and as a result of, the commission of, or attempt to commit, the crime of Kidnapping for the purpose of Extortion . . ."

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APPENDIX "2"

Thereafter, Petitioner filed in this Court a Petition for Writ of Mandamus, whereafter by Order of this Court oral arguments were held on the 1st day of March, 1976, and this Court assumed jurisdiction and allowed the parties time to brief the matter and stayed further proceedings in the Osage County District Court pending this Court's disposition of the instant matter.

After having heard the arguments and studied the briefs, we are of the opinion that this matter presents a question of first impression in this State. The issue for resolution is whether or not the Petitioner's prior conviction for Kidnapping for the Purpose of Extortion in Tulsa County is a bar to a subsequent prosecution for the offense of Murder in the First Degree in Osage County when the enumerated felony upon which the charge of Murder in the First Degree is predicated is Kidnapping for the Purpose of Extortion.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

Such provision is made applicable to the States through the due process clause of the Fourteenth Amendment in Benton v. Maryland, 395 U.S. 794 (1969). Article 2, § 21 of the Oklahoma Constitution likewise provides:

> ". . . Nor shall any person be twice put in jeopardy of life or liberty for the same offense."

The scope of the Federal constitutional guarantee was discussed in North Carolina v. Pierce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), wherein the Court stated:

> "That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for

for the same offense after conviction. And it protects against multiple punishments for the same offense."

The Oklahoma Code of Criminal Procedure in 22 O.S. 1971, § 14, provides:

"No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and duly convicted or acquitted, except as hereinafter provided for new trials."

Also, in 22 O.S.1971, § 522, the Code reads:

"When the defendant shall have been convicted or acquitted upon an indictment or information, the conviction or acquittal is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information."

The elusive concept of former jeopardy has been the subject and the cause for many judicially created variations of tests to be applied in determining whether or not a constitutional proscription against double jeopardy has been violated. Having extensively examined cases from other jurisdictions we find no precedent which we consider persuasive in view of the particular and unique character of our First Degree Murder Statute, 21 O.S.Supp.1973, § 701.1. Yet, this Court in Stockton v. State, Okl.Cr., 509 P.2d 153 (1973), citing Jackson v. State, 11 Okl.Cr. 523, 148 P. 1058, observed the true test of making double jeopardy a ban is whether the evidence necessary to support a second Information would be sufficient to pronounce a legal conviction on the first.

In the instant case Petitioner has been convicted of Kidnapping for the Purpose of Extortion and a particular punishment imposed thereon. For the State to convict the Petitioner of First Degree Murder in Osage County, an essential and indispensible element in the State's proof of the charge is that

the murder was committed during the perpetration of, or attempt to perpetrate, the felony of Kidnapping for the Purpose of Extortion. Hence, the evidence necessary to support the Information of Murder in the First Degree would be sufficient to pronounce a legal conviction on the first Information, Kidnapping for the Purpose of Extortion. Thus, in the instant case the test dictates that a plea of former jeopardy must be sustained Having been previously convicted of Kidnapping for the Purpose of Extortion, such felony may not afford a basis for additional punishment under a charge of Murder in the First Degree.

For the above and foregoing reasons, we find the Petitioner's Motion to Strike should have been granted, and upon remand the Respondent is directed to act accordingly. However, we do find, as the Petitioner submits, that the previous conviction for Kidnapping for the Purpose of Extortion does not in any way prohibit a subsequent prosecution for Murder in the Second Degree, in violation of 21 O.S.Supp.1973, § 701.2.

We are constrained to note further that in analogous situations in the future, it would be advantageous for the prosecutors from different districts to consult together prior to initiating prosecutions and proceeding to trial, specifically when a former jeopardy issue is involved.

For the above and foregoing reasons, our previous Order entered on the 1st day of March, 1976, staying further proceedings in the Osage County District Court, Case No. CRF-75-294, is hereby VACATED, and the Petition for Writ of Mandamus is GRANTED, with instructions to the above named Respondent

to proceed in accordance with the views expressed herein.

AN ORIGINAL PROCEEDING IN WHICH PETITIONER SEEKS A WRIT OF MANDAMUS. WRIT GRANTED, WITH INSTRUCTIONS.

HESKELL & HESKETT,
PAWHUSKA, OKLAHOMA,
Attorneys for Petitioner,

WILLIAM HALL, DISTRICT ATTORNEY,
TENTH JUDICIAL DISTRICT,
Attorney for Respondent.

PER CURIAM.

STATE OF OKLAHOMA } SS.
COUNTY OF OSAGE }

I, HELEN JOHNSON CHRISTENSON, COURT CLERK, in and for Osage County, Oklahoma, do hereby certify that the above and foregoing is a true, correct and complete copy of the original now on file in my office at Pawhuska, Oklahoma, as the same appears of record.

Witness my hand and official seal this 12th day of April 1978

HELEN JOHNSON CHRISTENSON, COURT CLERK,
By Virginia McClintock Deputy

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
JUL 29 1976
Ross N. Lillard, Jr.
CLERK

KURK KENDALL JOHNSON,)
)
Petitioner,)
)
-vs-) No. P-76-533
)
DON H. HAMPTON, District)
Judge, Tenth Judicial District,)
and/or THE STATE OF OKLAHOMA,)
et al,)
)
Respondents.)

ORDER DISMISSING PETITION FOR REHEARING AND/OR PETITION FOR WRIT OF PROHIBITION.

Petitioner has filed in this Court a pleading titled "PETITION FOR REHEARING AND/OR PETITION FOR WRIT OF PROHIBITION, PROHIBITING A TRIAL WITHIN THE MEANING AND SCOPE OF HOUSEHOLDER V. RAMSEY, OKL.CR., 485 P.2d 247; BENTON V. MARYLAND, 395 U.S. 794; TURNER V. ARKANSAS, 407 US 366" wherein he asserts that the State of Oklahoma should be collaterally estopped from relitigating in a prosecution for Murder in the Second Degree and/or subsequent trial, as directed by this Court in Kurk Kendall Johnson vs. Don Hampton, O-76-150, those issues determined in the prior kidnapping trial arising out of the alleged same facts and circumstances.

We observe the instant petition is predicated upon this Court's holding in O-76-150. We need only note and advise the petitioner that this Court entered an Order on the 12th day of July, 1976, withdrawing, vacating and setting aside the opinion rendered in O-76-150, staying further proceedings in said case and directing supplemental briefs. For this reason the instant petition is based at most, upon speculation and anticipation as to the decision this Court will ultimately render in O-76-150. Thus the instant petition fails to allege grounds sufficient to invoke the jurisdiction of this Court and the petition will, accordingly, be dismissed.

IT IS, THEREFORE, THE ORDER OF THIS COURT the petition in the above styled and numbered cause be, and hereby is, dismissed.

WITNESS OUR HANDS, and the Seal of this Court, this 29th day of July, 1976.

TOM BRETT, PRESIDING JUDGE

BRETT, JUDGE

C. F. BLISS, JR., JUDGE

ATTEST:

Ross N. Lillard Jr.
CLERK

APPENDIX "D"

out for injuries over and above that of original injury.[7]

It is an "elementary presumption that a wrongdoer should not be relieved of responsibility for his wrong because of arrangements made between the injured person and his employer; arrangements that are no concern of his."[8]

REVERSED.

HODGES, C. J., LAVENDER, V. C. J., and WILLIAMS, IRWIN, BERRY, BARNES and SIMMS, JJ., concur.

Kurk Kendall JOHNSON, Petitioner,

v.

Don H. HAMPTON, District Judge, Tenth Judicial District, State of Oklahoma, Respondent.

No. O-76-150.

Court of Criminal Appeals of Oklahoma.

May 16, 1977.

Defendant convicted in Tulsa County of kidnapping for the purpose of extortion filed petition for writ of mandamus to compel the Osage County District Court to grant his motion to strike, from an information filed in that court charging him with felony-murder in the first degree, language describing the underlying felony of kidnapping for the purpose of extortion. The Court of Criminal Appeals held that: (1) in prosecutions for felony-murder in the first degree or felony-murder in the second degree, the underlying felony is neither the same offense nor a lesser included offense since defendant is not charged with the underlying felony nor can he be convicted of the underlying felony; (2) therefore, defendant could be prosecuted for murder in the first degree notwithstanding that he had been previously convicted of the underlying felony.

Writ denied.

Brett, J., dissented and filed an opinion.

1. Homicide ⇐22(1)
Kidnapping ⇐1

Murder in first degree and kidnapping for purpose of extortion are two separate and distinct offenses as elements of first-degree murder include elements different and additional to those of kidnapping for purpose of extortion. 21 O.S.Supp.1973, §§ 701.1, subd. 2, 701.2, subd. 3.

2. Homicide ⇐18(1)

In prosecution for either felony-murder in first degree or felony-murder in second degree, underlying felony is neither same offense nor is it lesser included offense, as defendant is not charged with underlying felony nor can he be convicted of underlying felony as lesser included offense. 21 O.S.Supp.1973, §§ 701.1, subd. 2, 701.2, subd. 3.

3. Criminal Law ⇐200(1)

Defendant could be prosecuted in Osage County for felony-murder in first degree with underlying felony being commission of or attempt to commit offense of kidnapping for purpose of extortion, notwithstanding that he had previously been convicted in Tulsa County of said underlying felony; no former jeopardy claim was sustainable as murder in first degree is separate and distinct offense protecting different societal interest than kidnapping for purpose of extortion. 21 O.S.1971, § 745; 21 O.S.Supp.1973, §§ 701.1, subd. 2, 701.2 subd. 3.

7. *Travelers Insurance Company v. Leedy*, 450 P.2d 898 (Okl.1969).

8. Larson, "Workmen's Compensation Law", P. 14-106, § 2A:72.64 (1976). Also see "Workmen's Compensation: Immunity of Physician from Tort Action for Aggravation of Compensable Injuries", 29 Okl.L.Rev. 519 (1976); Annotation at 28 A.L.R.3d 1066.

APPENDIX "E"

An original proceeding in which petitioner seeks a writ of mandamus. Writ denied and previous order of March 1, 1976, Vacated.

Heskett & Heskett, Pawhuska, for petitioner.

Larry Derryberry, Atty. Gen., Frank Muret, Asst. Atty. Gen., for respondent.

OPINION

PER CURIAM:

Petitioner was charged in the District Court, Tulsa County, Case No. CRF-75-690, for the offense of Kidnapping for the Purpose of Extortion in violation of 21 O.S. 1971, § 745. Thereafter, on the 16th day of April, 1975, Petitioner was charged in the Osage County District Court, Case No. CRF-75-294, for the offense of Murder in the First Degree in violation of 21 O.S. Supp.1973, § 701.1. Subsequent thereto the Petitioner was tried and convicted as charged in the Tulsa County District Court and pursuant thereto was sentenced for a term of imprisonment of Sixty (60) years. To the charge of Murder in the First Degree filed in the Osage County District Court, the Petitioner entered a plea of former jeopardy, supplemented with a Motion to Strike, pursuant to 22 O.S.1971, § 513. Upon hearing, the above named Respondent overruled the Motion which sought to strike the following words from the Osage County Information:

". . . said acts and killing being perpetrated by the said Kurk Kendall Johnson pursuant to, and as a result of, the commission of, or attempt to commit, the crime of Kidnapping for the purpose of Extortion . . ."

Thereafter, Petitioner filed in this Court a Petition for Writ of Mandamus, whereafter by Order of this Court oral arguments were held on the 1st day of March, 1976, and this Court assumed jurisdiction and allowed the parties time to brief the matter and stayed further proceedings in the Osage County District Court pending this Court's disposition of the instant matter.

After having heard the arguments and studied the briefs, we are of the opinion that this matter presents a question of first impression in this State. The issue for resolution is whether or not the Petitioner's prior conviction for Kidnapping for the Purpose of Extortion in Tulsa County is a bar to a subsequent prosecution for the offense of Murder in the First Degree in Osage County when the enumerated felony upon which the charge of Murder in the First Degree is predicated is Kidnapping for the Purpose of Extortion, the prior conviction.

[1, 2] The two statutory offenses, Murder in the First Degree as charged against Johnson, and Kidnapping for the Purpose of Extortion are two separate and distinct offenses as the elements of First Degree Murder include elements different and additional to those of Kidnapping for the purpose of Extortion. A First Degree Murder prosecution under 21 O.S.Supp.1973, § 701.1, ¶ 2, necessitates the State prove that premeditated homicide was perpetrated by one committing or attempting to commit one of the four delineated felonies, or when the death occurs following the sexual molestation of a child under the age of sixteen (16) years. Proof of the particular underlying felony is required only because without it the homicide would be a lesser degree, second degree murder or manslaughter. Certainly the underlying felony in a second degree murder prosecution under 21 O.S.Supp.1973, § 701.2, ¶ 3, is separate and distinct offense than the felony murder and conviction of either would not bar prosecution and conviction for the other. See *Harris v. State*, 17 Okl.Cr. 69, 175 P. 627 (1918). For in a felony murder prosecution, such as a first degree murder prosecution under § 701.1, ¶ 2, supra, the underlying felony is required only because without it the homicide would be of a lesser degree, manslaughter, or possibly a noncriminal homicide. In either prosecution, Murder in the First Degree such as § 701.1, ¶ 2, or Murder in the Second Degree, § 701.2, ¶ 3, the underlying felony is neither the same offense nor is it a lesser included offense, as defendant is not

charged with the felony nor can he be convicted of the felony as a lesser included offense.

The evidence in the kidnapping case, *Johnson v. State*, Okl.Cr., 554 P.2d 51 (1976), established that Johnson kidnapped his victim in hopes of extorting a sum of money from the victim's relatives. The objective of extortion changed to murder after the attempts to extort the money apparently failed. The evidence does not establish that the purpose of the kidnapping was murder, but only that the purpose became murder after Johnson's extortion attempts failed and certainly the murder would also at least close the mouth of the one who could surely lead to Johnson's apprehension. Different societal interests are protected by the statutory laws prescribing kidnapping for the purpose of extortion and homicide. Certainly then two separate offenses may be committed although the offenses are proximate in time.

[3] Therefore, in the instant case Johnson may be prosecuted for Murder in the First Degree with the underlying felony being the commission of or the attempt to commit the offense of Kidnapping for the Purpose of Extortion, notwithstanding that he has been previously convicted of said underlying felony. No former jeopardy claim is sustainable as Murder in the First Degree is a separate and distinct offense protecting a different societal interest than Kidnapping for the Purpose of Extortion. *Williams v. State*, Okl.Cr., 321 P.2d 990 (1957), *Williams v. Oklahoma*, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959).

For the above and foregoing reasons, our previous order entered on the 1st day of March, 1976, staying further proceedings in the Osage County District Court, Case No. CRF-75-294, is hereby VACATED, and the Petition for Writ of Mandamus is DENIED in accordance with the views expressed herein.

BRETT, Judge, dissenting:

I respectfully dissent to this decision for the reason that as the information is laid it will become necessary to again prove all the elements of the offense of Kidnapping for the Purpose of Extortion prior to proving the alleged First Degree Murder. I believe, under the facts of this case, that the charge should be Murder in the Second Degree.

Bruce SHATTUCK, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-76-874.

Court of Criminal Appeals of Oklahoma.

May 17, 1977.

The District Court of Washington County, Arthur J. Boose, J., found defendant guilty of assault with a dangerous weapon, after former conviction of a felony, and he appealed. The Court of Criminal Appeals, Bliss, J., held that trial court did not abuse its discretion in overruling defendant's motion to strike his case from the jury term because the complaining witness' wife was allowed to remain on the jury panel for two weeks into the term, at which time her relationship with the complainant was brought to the attention of the court by a defense motion to strike the case from the jury term, where the complainant's wife had not been called to serve as a juror in any of the other trials conducted during the term, where she had been subjected to no voir dire examinations, where, upon questioning, she denied having discussed her husband's case with any of the other prospective jurors, where defendant was given the opportunity to question prospective jurors as to their knowledge of the facts of the case or their acquaintance with the complaining witness or his relatives, and where, in short, defendant could merely speculate that prejudice had influenced the verdict against him.

Affirmed.

held, even though the discharge had been upheld at the post-termination hearing.[1]

No decision of this Court is controlling on either the due process issue or the remedy issue decided by the Oregon Supreme Court. In Dixon v Love, supra, this Court held that the Illinois regulation providing for the automatic suspension of the license of a driver who had been convicted repeatedly for traffic offenses was constitutionally valid. In so holding, the Court relied on the fact that the driver "had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the Secretary's decision was based," 431 US, at 113, 52 L Ed 2d 172, 97 S Ct 1723; on the fact that the suspension and revocation decisions were "largely automatic" under the Illinois regulations, ibid.; and on "the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard." Id., at 114, 52 L Ed 2d 172, 97 S Ct 1723. None of those factors, decisive in Dixon, has any relevance to the issues decided by Oregon Supreme Court in this case.

Indeed, in Dixon the premise for the Court's legal analysis was " 'that something less than an evidentiary hearing is sufficient prior to adverse administrative action.' " Id., at 113, 52 L Ed 2d 172, 97 S Ct 1723 quoting Mathews v Eldridge, 424 US 319, 343, 47 L Ed 2d 18, 96 S Ct 893. Precisely the same premise provided the basis for the legal analysis of the Oregon Supreme Court. The court held that a pretermination evidentiary hearing was not required, but that "something less" was necessary—in this case, fair notice and an opportunity to respond. Whether or not that holding is correct, it is not even arguably inconsistent with either the holding or anything said by this Court in Dixon. Nor is there anything in Dixon which remotely relates to the question whether the remedy directed by the Oregon Supreme Court was proper.

In my judgment, even assuming that the Oregon Supreme Court has extended greater procedural protection to Oregon residents than the Federal Constitution requires, there is no need for this Court to address those issues until a conflict with the Oregon holding has developed on a national level. But if my judgment in this respect is incorrect, and enlightenment on a nationwide basis is indeed appropriate, surely the Court should provide something more edifying than a cryptic reference to a case as wide of the mark as Dixon v Love. This summary treatment of a carefully reasoned decision of the highest court of the State of Oregon fails to accord proper respect to that tribunal and gives no guidance whatsoever for further proceedings in this litigation. Cf. United States v Jacobs, 429 US 909, 50 L Ed 2d 277, 97 S Ct 299 (Stevens, J., concurring).[2]

I respectfully dissent.

No. 77-277. Allen Aaron Jackson, petitioner, v United States

434 US 947, 54 L Ed 2d 307, 98 S Ct 471.

November 14, 1977. On petition for writ of certiorari to the United States Court of Claims. Petition for writ of certiorari granted, judgment vacated and case remanded to the United States Court of Claims for further consideration in light of the position presently asserted by the Solicitor General in his brief filed October 25, 1977. Mr. Justice Rehnquist would deny the petition.

Same case below, 213 Ct Cl 354, 551 F2d 282.

No. 77-5161. Kurk Kendall Johnson, petitioner, v Don H. Hampton, District Judge, Tenth Judicial District of Oklahoma

434 US 947, 54 L Ed 2d 307, 98 S Ct 471.

November 14, 1977. On petition for writ of certiorari to the Court of Criminal Appeals of Oklahoma. Motion of petitioner for leave to proceed in forma pauperis and petition for

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1. The Oregon Court of Appeals had held that respondent was entitled to a pretermination hearing, but it limited the award of back wages to the period between the date of his dismissal and the date of his subsequent hearing. 23 Ore App 743, 543 P2d 1094 (1975).

2. Although four of us disagree with the Court's disposition of this case, the Justices who join this opinion do not insist that the case be orally argued. See Trinkler v Alabama, 418 US 917, 918, 41 L Ed 2d 1160, 94 S Ct 3207 (Brennan, J. dissenting).

APPENDIX "F"

writ of certiorari granted. Judgment vacated and case remanded to the Court of Criminal Appeals of Oklahoma for further consideration in light of Brown v Ohio, 432 US 161, 53 L Ed 2d 187, 97 S Ct 2221 (1977) and Harris v Oklahoma, 433 US 682, 53 L Ed 2d 1054, 97 S Ct 2912 (1977).

Same case below, 564 P2d 641.

No. ——. Mark Trail Campgrounds, Inc., applicant, v Field Enterprises, Inc.

434 US 947, 54 L Ed 2d 308, 98 S Ct 471.

November 14, 1977. Motion for reconsideration denied.

No. A-379. John W. Gibbs, applicant, v United States

434 US 947, 54 L Ed 2d 308, 98 S Ct 471.

November 14, 1977. Application for stay, presented to Mr. Justice Marshall and by him referred to the Court, denied.

No. A-384. William G. Walker, applicant, v Illinois et al.

434 US 948, 54 L Ed 2d 308, 98 S Ct 471.

November 14, 1977. Application for writ of habeas corpus, presented to the Chief Justice and by him referred to the Court, denied.

No. D-100. In the Matter of Disbarment of Owen Jennings Ooms

434 US 948, 54 L Ed 2d 308, 98 S Ct 472.

November 14, 1977. Owen Jennings Ooms, of Chicago, Illinois, having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause heretofore issued on April 4, 1977, is hereby discharged.

No. D-107. In the Matter of Disbarment of Edward S. Friedland

434 US 948, 54 L Ed 2d 308, 98 S Ct 472.

November 14, 1977. Disbarment entered.

No. 72, Original. State of South Dakota, plaintiff, v State of Nebraska

434 US 948, 54 L Ed 2d 308, 98 S Ct 472.

November 14, 1977. Exception of South Dakota to Report of Special Master overruled. Motion of Robert J. Foley et al. for leave to intervene as defendants granted.

No. 76-682. Santa Clara Pueblo et al., petitioners, v Julia Martinez et al.

434 US 948, 54 L Ed 2d 308, 98 S Ct 472.

November 14, 1977. Motion of Solicitor General for leave to file a brief, as amicus curiae, denied.

P.2d 1104 (1973). Also see *Davidson v. State*, Okl.Cr., 550 P.2d 955 (1976).

[3] For his second contention under this assignment of error the defendant alleges that there was a gap of approximately 21 days between the time the evidence was confiscated and the time it was received at the State Crime Bureau Laboratory. In support of his argument, the defendant cites as authority our recent holding in *Faulkenberry v. State*, Okl.Cr., 551 P.2d 271 (1976). However, in the *Faulkenberry* case, *supra*, the facts were essentially different. In that case there was an *unexplained* ten day gap before delivery to the State Crime Lab. In addition there was no testimony as to how the Exhibit arrived at the crime lab.

In the instant case there is no such unexplained gap and there is direct evidence as to how the substance arrived at the State Bureau. In the *Faulkenberry* case, *supra*, there was no showing at all as to where the evidence was during this ten day period. In the instant case, the evidence is clear that the substance was locked in the property room of the Fort Smith, Arkansas, Police Department and that only Officer Grizzle and Officer Yates had access to it. (Tr. 19–25). And finally, that one Jane Bates transported the substance to the State Crime Laboratory at McAlester on the 15th day of December, 1976. (Tr. 29–29).

The possibility for abuse or tampering that was present in *Faulkenberry*, *supra*, is simply not present in this case. Lapse of time is not prejudicial *per se* and doubt arises only if the passage of time is unexplained and suspicious. See *Contu v. State*, Okl.Cr., 533 P.2d 1000 (1975).

We find, therefore, that there was sufficient evidence in the chain of custody to justify the court admitting the evidence for the jury's consideration.

Finding no error which would cause this Court to either reverse or modify the judgment and sentence, we find that same should be, and hereby is *AFFIRMED*.

CORNISH and BRETT, JJ., concur.

Kurk Kendall JOHNSON, Petitioner,

v.

The Honorable Don H. HAMPTON, District Judge, Tenth Judicial District, State of Oklahoma, Respondent.

No. O–76–150.

Court of Criminal Appeals of Oklahoma.

Jan. 4, 1978.

ORDER WITHDRAWING OPINION AND GRANTING WRIT OF PROHIBITION

WHEREAS, on December 19, 1977 there was filed in this Court a true copy of an order, certified by the Deputy Clerk of the Supreme Court of the United States on the 14th of December, 1977, directing that the order entered by this Court in the above styled and numbered cause on the 16th day of May, 1977 be vacated, and remanding said cause for further consideration in the light of *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187, and *Harris v. Oklahoma*, —— U.S. ——, 97 S.Ct. 2912, 53 L.Ed.2d 1054.

NOW, THEREFORE, the opinion heretofore entered on the 16th day of May, 1977 in the above styled and numbered cause is vacated and set aside, and further prosecution of Kurk Kendall Johnson in the District Court, Osage County, Case No. CRF–75–294, for the offense of Murder in the First Degree in violation of Laws 1973, c. 167, § 1 is prohibited, and the court is directed to strike from the information in that case the following language:

". . . said acts and killing being perpetrated by the said Kurk Kendall Johnson pursuant to, and as a result of, the commission of, or attempt to commit, the crime if Kidnapping for the purpose of Extortion . . ."

This order is made without prejudice to the trial of the said Kurk Kendall Johnson on any charge of homicide which the facts

APPENDIX "G"

and justice may warrant, not inconsistent with the views expressed by the Supreme Court of the United States in *Brown v. Ohio* and *Harris v. Oklahoma*, supra.

WITNESS OUR HANDS and the Seal of this Court this 4th day of January, 1978.

HEZ. J. BUSSEY, P. J.
TOM R. CORNISH, J.
TOM BRETT, J.

CITIZENS SECURITY BANK OF BIXBY, Oklahoma, Appellant,

v.

John L. COURTNEY and Betty J. Courtney, husband and wife, Overhead Door Company of Tulsa, Inc., a corporation, Bradley's Heating and Air Conditioning, J & R Heating and Air Conditioning Company, Painters Supply of Oklahoma, Inc., a corporation, a/k/a Pan American Paint Co., d/b/a Painters Supply Co. of Tulsa, Inc., Marvin Dorris, Jr. and Wanda L. Dorris, d/b/a Marlee Carpets, M & M Lumber Company, Plywood of Tulsa, Mager Mortgage Company, and Guaranty Loan & Investment Corporation of Tulsa, Inc., a corporation, Appellees.

No. 49745.

Court of Appeals of Oklahoma, Division 2.

Sept. 13, 1977.

Rehearing Denied Oct. 4, 1977.

Certiorari Denied Dec. 21, 1977.

Released for Publication by Order of Court of Appeals Dec. 22, 1977.

First real estate mortgagee, who had acquired property by quitclaim deed from mortgagors, brought action against mortgagors and junior lienholders for mortgage foreclosure and to quiet its title. The District Court, Tulsa County, Robert G. Green, J., entered judgment for junior lienholders, and first mortgagee appealed. The Court of Appeals, Brightmire, P. J., held that: (1) evidence was not sufficient to support finding that bank, by accepting quitclaim deed on subject realty from bankrupt mortgagors, intended that its first mortgage lien therein be merged into the title, and (2) junior lienholders were not denied due process of law.

Reversed and remanded with directions.

1. Mortgages ⇐295(1)

Evidence, in action by first real estate mortgagee, who had acquired property by quitclaim deed from mortgagors, against mortgagors and junior lienholders for mortgage foreclosure and to quiet its title, was not sufficient to support a finding that first mortgagee, in accepting a quitclaim deed, intended that its first mortgage lien thereon be merged into title.

2. Mortgages ⇐295(1)

The so-called doctrine of "merger" whereby a mortgage lien remains in effect even after mortgagee obtains legal title if mortgagee's intent is that the lien remain in effect is an exception to common-law rule that when two legal estates meet in the same person a merger takes place. 42 O.S.1971, § 22.

See publication Words and Phrases for other judicial constructions and definitions.

3. Mortgages ⇐295(1)

Equity's merger inhibiting intervention when a mortgagee acquires legal title is aimed at doing subatantial justice and it is not available to aid in perpetrating a fraud or other unconscientious wrong.

4. Mortgages ⇐295(1)

Where it was to advantage of first mortgagee that its quitclaim deed to mort-

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
MAR 9 1978
Ross H. Lillard, Jr.
CLERK

KURK KENDALL JOHNSON,)
Petitioner,)
-vs-) No. P-78-101
DON H. HAMPTON, District Judge of the Tenth Judicial District of the State of Oklahoma,)
Respondent.)

ORDER DECLINING TO ASSUME JURISDICTION
AND DISMISSING PETITION
FOR WRIT OF PROHIBITION

Kurk Kendall Johnson has filed an application for Writ of Prohibition to prohibit the Honorable Don Hampton from proceeding to trial in Case No. CRF-75-294 wherein Petitioner is charged with the offense of Murder in the Second Degree. Petitioner alleges that by reason of his conviction for the crime of Kidnapping for the purpose of Extortion in the District Court, Tulsa County, Case No. CRF-75-690 the State is barred from further prosecution for the crime of Murder in the Second Degree and under the authority of Brown v. Ohio, ____U.S.____, 53 L.Ed.2d 187, 97 S.Ct. 2221, and Harris v. Oklahoma, ____U.S.____, 53 L.Ed.2d 1054, 97 S.Ct. 2912, we are of the opinion that the issue sought to be raised is properly reviewable on appeal and therefore decline to assume jurisdiction without prejudice with this issue being properly presented on appeal in the event Petitioner is convicted.

THE COURT THEREFORE declines to assume jurisdiction and DISMISSES the Petition for Writ of Prohibition.

WITNESS OUR HANDS, and the Seal of this Court, this 9th day of March, 1978.

HEZ J. BUSSEY, PRESIDING JUDGE

TOM R. CORNISH, JUDGE

TOM BRETT, JUDGE

ATTEST:

CLERK

APPENDIX "H"

area was stopped by a deputy, who noticed bolt cutters and a gun in plain view. The driver was arrested and an inventory search of the vehicle revealed the defendant's billfold and identification. We find this contention to be meritless for two reasons. First, the defendant lacks standing to challenge the search because he asserted neither a property nor possessory interest in the car, nor an interest in the property seized. See *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), reh. den. 439 U.S. 1122, 99 S.Ct. 1035, 59 L.Ed.2d 83. Second, the search and seizure was lawful because the evidence was discovered in plain view after an investigatory stop. See *Baledge v. State*, Okl.Cr., 554 P.2d 1388 (1976).

[7] The defendant's final assignment of error is that the prosecutor improperly suggested to the jury a definition of reasonable doubt in closing argument, saying, "you have a very plain duty to do here, to arrive at a reasonable conclusion that this defendant is guilty of the crime as charged." We find the defendant's argument to be without merit. The prosecutor was clearly arguing that it would be a reasonable conclusion for the jury to find the defendant guilty. We find this type of argument to be well within the bounds of proper closing argument.

The judgment and sentence is *AFFIRMED*.

CORNISH, P. J., and BRETT, J., concur.

KEY NUMBER SYSTEM

Kurk Kendall JOHNSON, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-78-516.

Court of Criminal Appeals of Oklahoma.

May 21, 1980.

Defendant was convicted in the District Court, Osage County, Don H. Hampton, J., of second-degree murder, and he appealed. The Court of Criminal Appeals, Cornish, P. J., held that: (1) defendant waived his claim that his rights against double jeopardy were violated; (2) by failing to object at trial, defendant waived any claim of error in connection with trial court's evidentiary rulings; (3) the verdict forms were not defective; and (4) even if error occurred when the prosecutor made reference to the death penalty during closing argument, the error did not violate a substantial right of defendant.

Affirmed.

Bussey, J., specially concurred and filed opinion.

1. Criminal Law ⇐161

The double jeopardy clauses of the Oklahoma and Federal Constitutions are intended to protect against two distinct abuses; the first is requiring an accused to endure a series of trials for the same offense and the second is the infliction of multiple punishments for a single offense. U.S.C.A.Const. Amend. 5; O.S.1971 Const. art. 2, § 21.

2. Criminal Law ⇐195(1)

In dealing with those cases in which there are multiple trials for crimes which, while distinct in law, constitute parts of a single criminal episode, a reviewing court must consider both aspects of the prohibition against double jeopardy, i. e., the prohibition against requiring an accused to endure a series of trials for the same offense and the prohibition against inflicting multi-

APPENDIX "I"

ple punishments for a single offense. U.S. C.A.Const. Amend. 5; O.S.1971 Const. art. 2, § 21.

3. Criminal Law ⇐196

For purpose of determining whether an accused has been twice placed in jeopardy for the same offense by being required to undergo a multiplicity of trials for that offense, the appropriate test is the "same transaction" test; however, the protection against multiplicity of punishment is separate and independent and, even when the "same transaction" test mandates a single trial, use of the "same evidence" test could result in finding that the defendant could be punished separately for each of the offenses involved. U.S.C.A.Const. Amend. 5; O.S.1971 Const. art. 2, § 21.

4. Criminal Law ⇐196

The fact that the Court of Criminal Appeals treats the double jeopardy issue in one case by using the "same transaction" test does not mean that the Court will not apply the other relevant test, i. e., the "same evidence" test, in appropriate cases. U.S.C.A.Const. Amend. 5; O.S.1971 Const. art. 2, § 21.

5. Criminal Law ⇐618

While defendant could be punished separately for second-degree murder and kidnapping for the purpose of extortion, both crimes should have been adjudicated in a single trial where the crimes were part of a single criminal episode and the circumstances were such that both charges could have been tried in Osage County.

6. Criminal Law ⇐1030(2)

Public interest in the effective administration of the criminal justice system precludes a defendant from waiting until a criminal proceeding is ended to assert alleged denials of constitutional protections.

7. Criminal Law ⇐105

Lack of jurisdiction is never waived and can be raised at any time.

8. Criminal Law ⇐204

Double jeopardy protections can be waived by failure to assert them at a timely stage. U.S.C.A.Const. Amend. 5; O.S.1971 Const. art. 2, § 21.

9. Criminal Law ⇐204

Where, though murder and kidnapping cases were in process at the same time, defendant did not raise double jeopardy issue until the kidnapping case had been completed and in fact succeeded in postponing his trial on the murder charge until the kidnapping trial was over and where, had the issue been timely raised, the kidnapping charge could have been dismissed in Tulsa County and filed in Osage County so that the two charges could have been tried together, defendant waived his double jeopardy claim. U.S.C.A.Const. Amend. 5; O.S. 1971 Const. art. 2, § 21.

10. Criminal Law ⇐698(1)

Failure to object to evidence admitted at trial is a waiver of any error arising from such admission.

11. Criminal Law ⇐698(1)

Evidence admitted at trial without objection may properly be considered by the jury.

12. Criminal Law ⇐798½

Verdict forms were not defective because they provided the alternatives "guilty" and "not guilty" rather than "guilty beyond a reasonable doubt" and "there is a reasonable doubt as to guilt" where, in his instructions to the jury, the trial judge specified the burden of proof numerous times and expressly told the jury that if they could not find beyond a reasonable doubt that defendant was guilty, then they were obliged to find him not guilty.

13. Criminal Law ⇐730(14)

Prosecutor's reference to the death penalty during closing argument, if error at all, did not violate a substantial right of defendant where the trial court properly instructed the jury with regard to the sentence to be imposed for second-degree murder.

An appeal from the District Court, Osage County; Don H. Hampton, Judge.

Kurk Kendall Johnson, appellant, was convicted of the offense of Second Degree Murder; was sentenced to ten (10) years' to life imprisonment, and appeals. AFFIRMED.

Bill L. Heskett, Heskett, Heskett, Daniel & Esser, Pawhuska, for appellant.

Jan Eric Cartwright, Atty. Gen., David W. Lee, Asst. Atty. Gen., Timothy S. Frets, Legal Intern, for appellee.

OPINION

CORNISH, Presiding Judge:

The appellant was arrested on March 31, 1975, for the kidnapping of Earl Edward Bell. The authorities later discovered that Bell had been murdered. Because it appeared that the abduction occurred in Tulsa County, the appellant was charged in the Tulsa County District Court, Case No. CRF-75-690, with the crime of Kidnapping for the Purpose of Extortion. He was also charged with the crime of First Degree Murder in the District Court of Osage County, Case No. CRF-75-294, where the body was found.

Preliminary hearings were held and the appellant was bound over on both charges. On September 3, 1975, the appellant moved for a continuance of the murder trial in Osage County until after the conclusion of the Tulsa County trial on the kidnapping charge. The motion was granted. On September 5, 1975, the appellant was convicted by a Tulsa County District Court jury of Kidnapping for the Purpose of Extortion. He was sentenced to sixty (60) years' confinement. On appeal this Court affirmed the conviction. See *Johnson v. State*, Okl.Cr., 554 P.2d 51 (1976), *cert. denied*, 429 U.S. 943, 97 S.Ct. 364, 50 L.Ed.2d 314 (1976). Thereafter, the appellant was convicted of Murder in the Second Degree in the District Court of Osage County. Punishment was fixed at ten (10) years to life imprisonment.

I

In this appeal of his murder conviction, the appellant raises the issue of double jeopardy. He argues that the murder and the kidnapping were parts of a single criminal episode and that, therefore, the kidnapping conviction barred the murder trial.

A

The double jeopardy issue was first presented to the Osage County District Court on December 8, 1975. At that time the appellant entered a plea of double jeopardy to the first degree murder charge and filed a motion to strike all references to the crime of kidnapping from the information for first degree murder. The motion was denied. The appellant then petitioned this Court for a writ of mandamus ordering the Osage County District Court to grant the motion to strike. This Court, in a per curiam opinion, denied the writ, stating:

". . . No former jeopardy claim is sustainable as Murder in the First Degree is a separate and distinct offense protecting a different societal interest than Kidnapping for the Purpose of Extortion. *Williams v. State*, Okl.Cr., 321 P.2d 990 (1957), *Williams v. Oklahoma*, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959)." *Johnson v. Hampton*, Okl.Cr., 564 P.2d 641 (1977), 11 A.L.R.3d 840 (Supp.1979).[1]

The United States Supreme Court granted certiorari, vacated this Court's order denying the writ of mandamus, and remanded for further consideration with particular attention to *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); and *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). See *Johnson v. Hampton*, 434 U.S. 947, 98 S.Ct. 471, 54 L.Ed.2d 307 (1977).

On remand this Court held that the crime of first degree murder, as charged, necessarily included the lesser offense of kidnapping for the purpose of extortion. We prohibited the trial of the appellant as originally charged, but further stated:

1. For cases from other jurisdictions, see Annot. "Earlier Prosecution for Offenses During which Homicide was Committed as Bar to Prosecution for Homicide." 11 A.L.R.3d 834 (1967).

"This order is made without prejudice to the trial of the said Kurk Kendall Johnson on any charge of homicide which the facts and justice may warrant, not inconsistent with the views expressed by the Supreme Court of the United States in *Brown v. Ohio*, and *Harris v. Oklahoma*, supra." *Johnson v. Hampton*, Okl.Cr., 572 P.2d 1301 (1978).

Subsequently, over the appellant's renewed plea of double jeopardy, he was convicted of the crime of Murder in the Second Degree.

B

The first assertion of error is the trial court's denial of the appellant's renewed motion to dismiss based on the plea of double jeopardy. The appellant urges us to apply the rule sometimes referred to as the "same transaction test." Under that rule a person cannot be held to answer for separate crimes at consecutive trials when the separate crimes were parts of a single criminal episode.

Generally, as noted in *Gowler v. State*, Okl.Cr., 589 P.2d 682 (1979), in determining the viability of a double jeopardy claim, the courts have utilized two tests referred to as (1) the "same evidence test" and (2) the "same transaction test," or a variation of the two. The "same evidence test" was initially employed in the English case of *Rex v. Vandercomb and Abbott*, 2 Leach 707, 168 Eng.Rep. 455 (1796). *Morey v. Commonwealth*, 108 Mass. 433 (1871), stated the rule in the first case to apply the rule in this country:

"A conviction or acquittal upon one indictment is no bar to a subsequent conviction or sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other."

Traditionally, the test employed to determine whether a person has been placed in jeopardy twice for a single offense has been to ask whether each of the offenses charged requires proof of an additional fact that is not necessary to the other. Thus, a single act may be an offense against two statutes. If each statute requires proof of an additional fact which the other does not, neither multiple prosecutions nor multiple punishments are barred by the prohibition against double jeopardy, even though each offense may arise from the same act or criminal episode. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *Collins v. State*, 70 Okl.Cr. 340, 106 P.2d 273 (1940).

We find no consistent solution to the problem in examining prior cases from this Court. The same is true when we look to other jurisdictions. The United States Supreme Court has not said any one test is required by the Fifth Amendment.

Extensive research on this question indicates that the "same evidence test" is utilized by a majority of state and federal courts.[2] However, the problem is that with the proliferation of separately defined substantive crimes by the state legislatures the number of substantive offenses that may arise from a single criminal transaction has increased markedly. Thus, mechanical application of the "same evidence test" results in a decrease in the double jeopardy protection.

Critics of the same evidence test include in their ranks current members of the United States Supreme Court. In *Ashe v. Swenson*, 397 U.S. 436, 451, 90 S.Ct. 1189, 1198, 25 L.Ed.2d 469 (1970), Justice Brennan, in a separate opinion in which Justices Douglas and Marshall joined, made a scathing attack upon the same evidence test, finding that it "virtually annuls the constitutional guarantee." He further said:

". . . The 'same evidence' test permits multiple prosecutions where a single transaction is divisible into chronologically discrete crimes. . . . Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition

2. *Twice in Jeopardy*, 75 Yale L.J. 262 (1965).

of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution, the potentialities for abuse inherent in the 'same evidence' test are simply intolerable." (Citations omitted, footnotes omitted)

Other critics and modern writers maintain that the proper test to determine whether a person has been twice placed in jeopardy for a single offense is to ask whether the offenses charged were parts of the same criminal act, occurrence, episode or transaction.[3] If the answer is in the affirmative, then multiple prosecutions or punishments should be barred by the Double Jeopardy Clause. It is urged that the "same transaction test," by consolidating in one lawsuit all issues arising out of a single transaction, best promotes justice, economy and convenience.

The "same transaction test" has been adopted in some states by statute.[4] A few states have adopted the test by court decision.[5] It is also interesting to note that in England, where the "same evidence test" derived, the House of Lords indicated in 1964 that joinder of offenses arising out of the same transaction would be required in the future. *Connelly v. Director of Public Prosecutions*, A.C. 1254 (1964).

We would also point out that the "same transaction test" as viewed by Justice Brennan does not necessarily preclude a defendant from being convicted and punished for each offense joined. *Abbate v. United States*, 359 U.S. 187, 198, 79 S.Ct. 666, 672, 3 L.Ed.2d 729 (1959). Thus, it is possible to apply the "same transaction test" to determine when offenses should be joined, yet apply the "same evidence test" to determine whether the defendant can be subjected to separate convictions and punishments for the offenses joined. *Commonwealth v. Campana*, 452 Pa. 233, n. 5, 304 A.2d 432, n. 5 (1973).

Utilizing this test, this Court has held that separate crimes were in fact committed when two or more crimes were committed within the same brief span of time. *Starnes v. State*, Okl.Cr., 507 P.2d 920 (1973). Also, where crimes against separate and distinct persons were involved, we have held that, even though the crimes were a part of one criminal episode and were similar in nature, prosecution for each separate offense was not barred. *Jennings v. State*, Okl.Cr., 506 P.2d 931 (1973).

C

[1] Much of the confusion surrounding the double jeopardy concept arises from the injustice of applying either test, to the exclusion of the other, in all cases. In this regard, it must be recognized that the Double Jeopardy Clauses of our State and Federal Constitutions are intended to protect against two distinct abuses. The first is requiring an accused to endure a series of trials where the same offense is charged; the second of these is the infliction of multiple punishments for a single offense. *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). A clear understanding of these distinct functions of the Double Jeopardy Doctrine makes clear the undesirability of adopting either the "same evidence test" or the "same transaction test" to the exclusion of the other. An analysis of past decisions of this Court reveal what we believe to be a proper working relationship between the two tests.

In the case of *Starnes v. State*, supra, the defendant was charged with robbery by force and attempted rape, with both offenses arising out of one criminal episode. He pleaded guilty to both charges, and concurrent sentences were imposed. On ap-

3. Note, Criminal Law: *The Same Offense in Oklahoma—Now You See it, Now You Don't*, 28 Okl.L.Rev. 131 (1975); *Commonwealth v. Campana*, 452 Pa. 233, 304 A.2d 432, 435, 436 (1973); *State v. Brown*, 262 Or. 442, 497 P.2d 1191 (1972); Noe, *Criminal Law—Double Jeopardy—Should "Offense" be Defined in Terms of Substantive Law?*, 38 Mo.L.Rev. 528, 530 (1973); Note, *The Protection Against Multiple Trials*, 11 Stan.L.Rev. 735 (1958).

4. See N.Y.Crim.Proc.L. 40.20(2); 40 Minn. Stats.Anno. 609.035.

5. *State v. Ahuna*, 52 Haw. 321, 474 P.2d 704 (1970).

peal, the defendant contended that the offenses arose out of the same event and that, therefore, it was error to convict the defendant of two separate offenses. The aspect of double jeopardy involved in *Starnes* was the protection against multiple punishments for a single offense. In upholding the imposition of separate punishments, this Court employed the "same evidence test," finding that the robbery and the attempted rape were two separate and distinct offenses, consisting of different elements. Application of the "same evidence test" under the facts of *Starnes* does not, however, necessarily imply that the "same transaction test" cannot be applied to other factual circumstances.

In *Lawson v. State*, Okl.Cr., 484 P.2d 900 (1971), the defendant broke into the victim's home with the intent to commit larceny. When confronted inside the home, he robbed the victim at gunpoint. The defendant was tried and convicted of armed robbery and was later convicted of burglary. On appeal the burglary conviction was reversed. The Court held that the same evidence was used in both trials. In ruling that there could not be separate trials for the burglary and the robbery, this Court employed the "same transaction test" to determine that the defendant had been tried twice for a single offense.

The conclusion to be reached after a careful analysis of *Starnes* and *Lawson* is that this Court has not accepted either the "same evidence test" or the "same transaction test" exclusively. Rather, recognizing the distinct functions of the Double Jeopardy Doctrine, this Court has adopted the test that would most advance the interests of justice in each particular case.

Following this view, we have held that where a defendant robbed a drugstore, taking money and narcotics, and was arrested four hours later in possession of narcotics, consecutive trials and convictions for armed robbery and possession of narcotics were not barred by the Double Jeopardy Doctrine. *Ryan v. State*, Okl.Cr., 473 P.2d 322 (1970). In a special concurrence, it was emphasized that the distinguishing features in the case were the time and location of the two offenses, the implication being that had the narcotics offense not been carried over to a distant time and place the result would have been different. Compare *Hochderffer v. State*, 34 Okl.Cr. 215, 245 P. 902 (1926), where the elements of time and location were the same. On the other hand, where two defendants kidnapped the victim and, with a third defendant, then committed rape of the same victim, we found that the act of kidnapping the victim was but a part of the force requisite to the greater offense of rape. We held that the defendants could not be punished for both kidnapping and rape, which was one transaction. *Brumbelow v. State*, Okl.Cr., 488 P.2d 1298 (1971).

Perhaps some confusion has resulted from our opinion in *Smith v. State*, Okl.Cr., 486 P.2d 770 (1971). There, the defendant was charged with robbing a taxi driver at knife point, taking the victim's money after stabbing him once in the neck and twice in the chest. The defendant was first convicted of assault and battery with a deadly weapon with intent to kill, and that conviction was affirmed. See *Smith v. State*, Okl.Cr., 481 P.2d 804 (1971). At a later trial, the defendant was convicted of robbery with a dangerous weapon, and on appeal, he raised a double jeopardy question. A strict application of the "same evidence test" would not have required a reversal because the intent to kill is not an element of robbery and, conversely, assault with intent to kill does not require the taking of property from the victim. However, this Court reversed the robbery conviction, holding that separate trials could not be held on the robbery and assault charges.

Smith v. State, supra, could be read to imply that 21 O.S. 1971, § 11,[6] mandates

6. Title 21 O.S.1971, § 11, provides:

"If there be in any other chapter of the laws of this state a provision making any specific act or omission criminal and providing the punishment therefor, and there be in this penal code any provision or section making the same act or omission a criminal offense or prescribing the punishment therefor, that

application of the "same transaction test" exclusively when construing Art. 2, § 21,[7] of the Oklahoma Constitution. We intended no such implication, and the cases cited do not support that conclusion. In *Smith* this Court cited *State v. Mendoza*, 107 Ariz. 51, 481 P.2d 844 (1971), in which the defendant committed a forcible rape after threatening the victim with a knife. At a single trial, the defendant was convicted of the crimes of assault with a deadly weapon and first degree rape. The Arizona Supreme Court affirmed the rape conviction and reversed the conviction for assault with a deadly weapon. In so doing, the Court stated:

"In a recent opinion of this Court, wherein the defendant was charged with attempted kidnapping while armed with a gun, Count I, and assault with a deadly weapon or instrument, to wit: a gun, Count II, both offenses or counts arising out of the same act, our Court stated that the 'practical test is to eliminate the elements in one charge and determine whether the facts left would support the other charge.' *State v. Mitchell*, 106 Ariz. 492, 478 P.2d 517, 520 (1970). In the instant case, it is clear that the element of force or violence necessary to the crime of 1st degree rape was supplied by the fear of personal violence induced by the defendant's usage of a deadly weapon, to wit: the knife, and without such usage that the element of 1st degree rape would not exist. . . ." (Citation omitted)

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"We do not by this opinion hold that there cannot be fact situations wherein a person may be convicted of both assault and 1st degree rape. That determination must be made on a case to case basis. We do hold that under the facts in this case the two convictions and sentences cannot stand together. . . ." (Citations omitted)

From the language, it is clear that the Arizona Court utilized the "same evidence test" in deciding the double jeopardy issue.

In *People v. Ridley*, 63 Cal.2d 671, 47 Cal.Rptr. 796, 408 P.2d 124 (1965), also cited in *Smith v. State*, supra, the defendant was charged with assault with a deadly weapon with intent to commit murder and first degree robbery. At a single trial, the defendant was convicted of both offenses. Use of the "same evidence test" resulted in a finding that the assault was the means of perpetrating the robbery and that both offenses were incident to one objective, robbery. Therefore, the defendant could be punished for any one of the offenses, but not for more than one. There was only a single offense, and the defendant could not be tried twice for it. *In re Henry*, 65 Cal.2d 330, 54 Cal.Rptr. 633, 420 P.2d 97 (1966), presented the Court with the same issue, and the same rationale was employed in an opinion by Chief Justice Traynor.

Both Arizona and California have statutes similar to 21 O.S.1971, § 11. See Ariz. Rev.Stats., § 13-1641, and the California Penal Code, § 654. See also *Wildman v. State*, 42 Ala.App. 357, 165 So.2d 396 (1963).

While a few states have adopted the same transaction standard as a matter of state law, it has not been applied as a federal constitutional requirement. As noted in *Cousins v. State*, 277 Md. 383, 354

offense and the punishment thereof, shall be governed by the special provisions of this penal code. But an act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, except that in cases specified in §§ 51 and 54, the punishments therein prescribed are substituted for those prescribed for a first offense, but in no case can [it] be punished under more than one; and an acquittal or conviction and sentence under either one, bars the prosecution for the same act or omission under any other." (Footnote omitted)

7. Art. 2, § 21, of the Oklahoma Constitution, provides:

"No person shall be compelled to give evidence which will tend to incriminate him, except as in this Constitution specifically provided; nor shall any person, after having been once acquitted by a jury, be again put in jeopardy of life or liberty for that of which he has been acquitted. Nor shall any person be twice put in jeopardy of life or liberty for the same offense."

A.2d 825 (1976), the majority of states have not adopted the "same transaction test" but have continued to apply the "same evidence test" for defining whether two offenses are the same for double jeopardy purposes. Cited therein as rejecting the "same transaction test" is *Kupiec v. State*, Okl.Cr., 493 P.2d 444, 446 (1972).

In *Kupiec* the defendant forced his way into a house, took various items of personal property, and raped one of the residents. There were separate trials for armed robbery and rape, with evidence of both crimes being presented at both trials. The defendant's double jeopardy argument was rejected, using a strict "same evidence" approach. The Court said that the armed robbery and the rape were clearly separate and distinct crimes and that the proof required for each was quite dissimilar. The "evidence of other crimes" issue was also raised, but it was treated by the Court's saying that evidence of other crimes was properly admitted in both cases as part of the res gestae.

D

In reaching what we believe to be a reasonable approach to this complex issue, we note that the cases raising double jeopardy claims come within a few broad categories. In one category, are those cases in which, in a single trial, a defendant is convicted of two offenses arising from the same general criminal episode. In such cases we have generally held that the interests of justice are best served by application of the "same evidence test" to determine the propriety of multiple charges. In another group are those cases in which a defendant is convicted of two crimes, one of which is, as a matter of law, a necessary element of the other. Here, whether there was one trial or two, application of either test will result in one conviction being vacated.

[2–4] The preceding categories are the black and white groups. In the gray category are those cases in which there are multiple trials for crimes which, while distinct in law, constitute parts of a single criminal episode. In dealing with these cases, an appellate court must consider both aspects of double jeopardy discussed above: More than one trial for a single offense and more than one punishment for a single offense. We believe that the protection against multiplicity of *trials* is best advanced by application of the "same transaction test." However, the protection against multiplicity of *punishments* is a separate and independent question; and even where the "same transaction test" mandates a single trial, application of the "same evidence test" could result in a holding that a defendant could be punished separately for each of the offenses involved. In this connection, we again remind prosecutors of the special concurring opinion attached to *Dodson v. State*, Okl.Cr., 562 P.2d 916 (1977), in which Judge Brett explained that where a series of acts is involved, an accused can be charged with several counts in a single information.[8] It should not be inferred that because we treat the double jeopardy issue in one case by using one test this Court will not apply the other test in appropriate cases.

By this opinion we do not, in the words of Mr. Chief Justice Burger, find ourselves "endowed with a perception all our predecessors lacked and in an area of the law encountering no new facts." See the dissenting opinion by Burger, C. J., in *Ashe v. Swenson*, supra, 397 U.S. at 464, 90 S.Ct. at 1204. Instead, we merely follow the collective wisdom of this Court's prior decisions and elect that course which allows this Court to utilize the necessary tools to accomplish the task before it. In taking this course, we do nothing more than elevate the distinct purposes of the Double Jeopardy Doctrine to the equal dignity and reverence each deserves.

[5] This reasoning leads us to conclude that while the appellant herein could be punished separately for Murder in the Second Degree and Kidnapping for the Pur-

8. Further, pursuant to 22 O.S.1971, § 439, if it appears that a defendant or the State is prejudiced by joinder of offenses in an indictment or information, the court shall order an election or separate trial of counts or provide whatever other relief justice requires.

pose of Extortion, both crimes should have been adjudicated in a single trial. The murder charge could not have been tried in Tulsa County because of a lack of venue; however, because kidnapping is a continuing crime, both charges could have been, and should have been, tried in Osage County.[9]

[6–9] On the other hand, public interest in the effective administration of the criminal justice system precludes a defendant from waiting until a criminal proceeding is ended to begin asserting alleged denials of constitutional protections. There are, of course, some constitutional rights which are never finally waived. Lack of jurisdiction, for instance, can be raised at any time. This is not true of the double jeopardy protection. See *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977). Although both the murder and the kidnapping cases were in process at the same time, the appellant did not raise the double jeopardy issue until the case in Tulsa County (kidnapping charge) had been completed. In fact, he succeeded in postponing the Osage County case (murder charge) until the other one was over. Had the issue been raised in the beginning, the kidnapping charge could have been dismissed in Tulsa and filed in Osage County, so that the two charges could have been tried together; whereas enforcement of the double jeopardy protection in accordance with the appellant's strategy would have barred prosecution of the appellant on one of the charges. This Court, accordingly, holds that the appellant waived his double jeopardy protection.

II

[10, 11] The appellant next asserts that the trial court erred in overruling defense counsel's motion to suppress and his demurrer to the evidence. He asserts the verdict is unsupported by the evidence. As each item of evidence was introduced at trial the defense attorney responded, "No objection." The failure to object to evidence admitted at trial is a waiver of any error that such admission might have constituted. *Box v. State*, Okl.Cr., 541 P.2d 262 (1975). The logical implication of the failure to object is that the appellant acquiesced in the court's ruling on the motion to suppress. It follows that the appellant's assertion is also without merit because evidence admitted at trial without objection may be properly considered by the jury.

III

[12] We next consider the allegation that the verdict forms were defective. The appellant insists that the usual verdict forms slur over the State's burden of proof: instead of forms for finding an accused "guilty" or "not guilty," he proposes that the forms should read "guilty beyond a reasonable doubt" and "there is a reasonable doubt as to guilt." In his instructions to the jury, the judge specified the burden of proof numerous times; and he expressly told the jury that if they could not find beyond a reasonable doubt that the appellant was guilty, then they were obliged to find him not guilty. The appellant's argument is unsound.

IV

The final assertion of error is that the prosecutor's closing argument was improper. Specifically, the appellant contends that in referring to the testimony of the appellant's brother relative to a telephone conversation between the appellant and his brother, the prosecutor recounted, "Find Duck. Tell him if he is any kind of cousin he will find that body and get rid of it because if he don't, I'll get the electric chair." The prosecutor then continued, "They found the body, and after you have seen the evidence in this case, you may wish that the rest of his statement was true there. He said, 'If they don't find the body . I'll get the electric chair.' If there is any person whoever deserved it, he is sitting right in front of you, right there."

9. Or, had there been no kidnapping charge in another county, the Osage County District Attorney could have forgone the kidnapping charge and filed a single charge of murder.

[13] The appellant contends that this reference to the death penalty during closing argument was so prejudicial to the appellant as to require a reversal. We do not agree. The trial court properly instructed the jury with regard to the sentence to be imposed upon a conviction for second degree murder. In view of the proper instruction of the court, the complained of error in the prosecutor's closing argument, if error at all, did not violate a substantial right of the accused.

The judgment and sentence is *AFFIRMED.*

BRETT, J., concurs.

BUSSEY, J., specially concurs.

BUSSEY, J., specially concurring:

The offenses of kidnapping and murder in the second degree are separate and distinct crimes under the facts of this case. *Cf.* 21 O.S.Supp.1976, § 701.8, ¶ 2, and *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). A conviction for one should not bar the prosecution and conviction of the other. In summary, each of these charges requires the proof of at least one and, in fact, several facts or elements that proof of the other does not so require. The Double Jeopardy Clauses of the state and federal constitutions are not offended by separate prosecution and punishment here. See *Clay v. State*, Okl.Cr., 593 P.2d 509 (1979), and *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).